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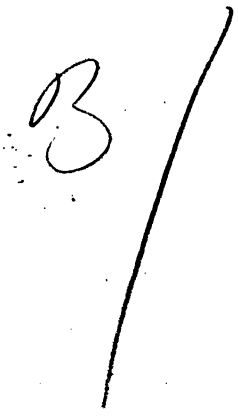

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CIVIL PROCEDURE

AMONG

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A HISTORICAL SKETCH

OF

CIVIL PROCEDURE

AMONG

THE ROMANS.

BY

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TO

HIS ROYAL HIGHNESS

PRINCE ALBERT,

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PREFACE.

A CONSIDERABLE portion of the matter contained in these pages was delivered in the shape of Lectures, at the University of Cambridge, on the Rise and Progress of Civil Procedure among the Romans.

My original aim was to dwell upon the historical features in this branch of their legal institutions, and to exhibit its steady progress from the ancient rude symbolism of the Twelve Tables, to the more complex technicality of the Imperial Code, rather than to attempt to make a treatise on actions at law.

But as I advanced in my task I found many points requiring special notice; and though the labours of Heffter, Savigny, Zimmern, Walther, and Ortolan had cleared away the difficulties, and left little or nothing that was new, for a writer on this part of Roman law to speak of, yet the

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inaccessibility to many persons of their works, and the quantity of matter contained therein, induced me to seize upon a few salient points, and exhibit them in an English dress.

Of these topics the most noteworthy to my mind were the separation of the legislative and judicial functions of the chief magistrates at Rome, the peculiar position of the Judex, the influence of equitable remedies on the Jus civile, the history of Interdicts, and the change in the character of Appeals, and mode of bringing them; most noteworthy because they belong really to the history of the Roman people, and emphatically mark those elements of their character so strenuously insisted on, and so eloquently described by Savigny, viz. the holding fast by the long-established without allowing themselves to be fettered by it; and the quick, lively, political spirit by which the power of their constitution was renovated, so that what was new merely ministered to the development of what was old.

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The chapter on Evidence was added in order to bring together from the pages of Gothofred, Pothier, and Huber some few of the leading principles on which this part of the Roman law of procedure was based, that by this means might be exhibited, not only the contrast between the system of that people and our own, but the peculiar advantages which Roman jurisprudence, by reason of its high state of cultivation, affords of serving as a pattern and model for all scientific labours in law.

Perhaps no period of time could be found better adapted than the present for dwelling upon the doctrines of the Roman law, and insisting on its merits in aid of the development of legal principles. The extensive alterations in our process and forms of pleading, the gradual *rapprochement* of equity to common law, the steady progress that is going on in the removal of those feudal notions that have hampered our law of real property, and overlaid it with technical difficulties, expressed in a jargon as barbarous as it is unphilosophical, are some

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among other beneficial changes by which we may hope in time to approximate to that point of excellence ascribed by Savigny to the Roman law, when we shall have a system that may be discovered by plain good sense, not overlaid with intolerable formalities and narrow pedantry on the one hand, nor too abstruse and complicated for the apprehension of all but a few on the other; a system not purposedly confined to a few high priests and patricians, like the Actiones legis of old, but one approved and appreciated by all, on account of its simplicity and clearness, where the "theory and practice may be the same, the one framed for immediate application, the other ennobled by scientific treatment, and where we shall see in every principle a case for application, in every case a rule by which to decide it."

The remarks of an elegant scholar of our own time (whose writings prove his eminent qualities as a jurist) come in aid of the views here maintained, that the Roman law deserves especial attention and

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deep study in the present day. "It is not," says Dr. Maine, in his masterly essay on Roman law and legal education[1], "because our jurisprudence and that of Rome were *once* alike that they ought to be studied together, it is because they *will be* alike, it is because we in England are slowly and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation."

These are admirable words, the truth and value of which become the clearer the closer we scrutinise the tendency of our modern legal reform; but to two, among the many questions of the day, does the importance of the study of the Roman law most apply, viz. the demand for codification, and the demand for legal education. The difficulties that stand in the

[1] See the Cambridge Essays for 1856.

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way of the first of these questions are many and powerful, not the least of which is what the writer above quoted so forcibly insists upon, viz. the decay of technical phraseology in the English law, and the want of a proper legal terminology, by which a definite and concise expression of legal conceptions may be given; an evil that presented itself as one of such importance to the mind of Mr. Livingstone, as required at once to be removed, and necessitated the addition to his Code of Louisiana of a book of definitions.

How admirably the Roman Law comes in aid of this defect, and what service may be rendered to our legal phraseology by the writers whose technical language is so skilfully exhibited in the pages of the Digest, Dr. Maine has sufficiently shewn. But it is in its connexion with legal education that the Roman Law stands preeminently forth. If we are to expect a properly devised system of codified, or well arranged law, is it too much to ask for minds trained up to the

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task, and capable of providing for the combination of theory and practice, that must present itself therein? And if what Bacon says be true, that the age in which a code should be formed should exceed preceding ages in intelligence, what answer shall be made to the question, "Is this such an age, and have we the means at our disposal for such a task?" Can we say that our general mass of legal intelligence is superior to what is past, or can we avoid seeing the inferiority of our own juridical writers to the jurists of neighbouring countries. And when we search for reasons for such a state of affairs, one above all must strike us, viz. the want of a sound legal training for those who are to become the proposers and exponents of the laws of this country.

For one thing and the other, for legal reform, whatever shape it may assume, and for legal education, the maxims and principles embodied in the Roman Law, and the language in which they are framed, undoubtedly are of inestimable value.

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The study of the Roman Law will help to bring out that twofold spirit, which, to use Savigny's words, is indispensable to the jurist—the *historical*, by which the peculiarities of every age and every form of law may be seized and appreciated, the *systematic*, by which every notion and every rule may be placed in lively connexion and cooperation with the whole.

In conclusion, let us hope that the time is not only coming, but is not far off, when the phraseology of the Statute-Book will not be the worse for a rate in aid from its friendly, not rival neighbour, the Corpus Juris, and the champions of Archbold, Tidd and Chitty will have no cause to fear the utter destruction of these eloquent commentators, although our students are brought up to peruse and admire the learning of Ulpian, Gaius and Papinian.

CAMBRIDGE,
June 18, 1857.

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EXPLANATION OF REFERENCES.

I. and Inst. stands for the Institutes of Justinian.

D. for Digest.

C. for Justinian's Code.

N. for the Novellæ Constitutiones.

Cod. Theod. for the Codex Theodosianus.

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LAW OF CIVIL PROCEDURE AMONG THE ROMANS.

Chapter I.

The general nature of an action at Law.

In every civilised country we find the most careful attention paid to that branch of their laws, whether codified or not, that relates to what is called Procedure. I propose in the following pages to investigate the principles on which the Roman Law of Actions was founded, and in tracing the changes that from time to time took place in them, to shew how immediately they were influenced by the alterations of manners, thoughts and habits among the people themselves. It will however, in my opinion, be useful briefly to explain the notion involved in that which is called Civil Procedure, or Action at Law, and to commence

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with laying down certain positions as starting points.

First of all, then, it must be understood that "a right," or "Jus," taken subjectively, is the claim made by an individual, and recognised by the State to some fixed and certain object, by virtue of which claim such object is submitted to the juridical decision of another; hence three conditions are necessary in every such claim, in order to complete it as a Right:—

1st. A subject capable of exercising the right.

2nd. An object to which the right is attached; and

3rd. A determined fact, with which the acquisition of the right is connected, in accordance with juridical principles; that is its foundation, or that which calls it into existence and sustains it afterwards.

2ndly. The most simple and convenient aspect, in which rights may be regarded, is twofold;—one relating to their extent, the other to their object. Under the first head,

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although in reality they have a general and universal interest, yet have they also an individual one, attaching to their possession; and therefore they are either *absolute* and *generally obligatory*, or *relative* and *personal*. Under the second head, we consider their foundation and their aim, that is, not only as connected with individuals, but as concerned with things and actions; in the one case we call them Jura in Re, or property rights; in the other, Jura ad Rem, or obligation rights. And this division we find expressed by the Roman lawyers in these words, "Omne jus quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones." Inst. I. 2.12. Gaii, I. § 8.

3rdly. As a result of such a notion of a right it may safely be laid down, that the possessor of it is entitled to exercise it, and in so doing, as long as he confines himself to its limits, he cannot be acting wrongfully or unjustly; that no one can be allowed to interfere with his enjoyment, and that if any interference takes place it is the business of the State to come to the assistance

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of him who is thus injured: but that it is the business of every good citizen of a well ordered State not to take the law into his own hand, but to appeal to the judicial authority for aid.

Here then we find ourselves touching at once on the demesne of remedies. Our first questions naturally are, To whom ought we to apply for aid? in what form ought we to demand that aid? and how will he to whom we have to apply proceed in the settlement of our fair claim, and in the repression of our adversary's unjust claim? These are really all the points for investigation in that which is called Civil Procedure; and therefore it is that Action has been defined by the Roman lawyers to be "nihil aliud quam Jus[1] persequendi judicio[2] quod sibi debetur[3]," by the English lawyer, "action n'est autre chose que loyal demande de son droit."

Inst. IV. 6. 1.

Co. Litt. 285.(a)

We mean by Right of Action then, first the right, which he, who is injured in any

[1] Right of remedy.
[2] The authority and place where.
[3] The object aimed at by the plaintiff.

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way by another, has to claim redress; further we understand by the word Action itself, not only the exercise of such a right, but technically the written act or process, as we term it, which opens the judicial discussion. At present I propose to consider first, the right of action among the Romans historically, and then to advance to some of the technicalities involved in their law of actions. Under the first head I shall distinguish the periods of change in the history of actions into three epochs.

First Epoch. Actiones Legis.

The first and rudest of these is exhibited under the class of what were termed Legis Actiones, (an expression that marks more especially their form); and these remedies of injury and violence consisted of symbolical acts, accompanied by certain verbal forms, always strictly adhered to.

Second Epoch. Formulary system.

The second epoch was marked by the destruction of these Legis Actiones, and the substitution of the Formulæ, as the basis of all procedure; a change distinctly explained by Gaius in these words, "Per legem Æbutiam, et duas Julias sublatæ sunt istæ

IV. § 30.

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legis actiones, effectumque est ut per concepta verba, id est per formulas, litigaremus." From which we may gather, that the symbols and pantomime of the old Legis Actiones were removed, and that the matter in dispute was laid before the Prætor or Judex, in the shape of written pleadings, or "concepta verba, vel formulas."

Third Epoch. Judicia Extraordinaria. A.D. 282.

This second stage or formulary process lasted till the reign of Diocletian, in whose time, or perhaps a little later, the custom of nominating a Judex was exchanged for that of referring the matter to a Magistratus, and the Ordo Judiciorum Privatorum was merged in the Judicia Extraordinaria; one consequence of which was a departure from the strict formulary process and technical pleadings, and an introduction of equitable interpretations.

C. 2. 58.

But such important changes as these require a few words of explanation; and I propose now to dwell briefly on each of these epochs, and shew how each was adapted to the spirit of the particular period in which it flourished, and how

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each alteration was produced by uncontrollable circumstances.

Roman characteristics in the first period.

The era in which the first of these judicial remedies grew into repute, was that portion of time that extended from the earliest attempt at codifying or systematising the laws of Rome, to the establishment of the Prætorship, *i.e.* from the time of the Twelve Tables to the year A.U.C. 387, a period full of eventful years for Rome, marked by bloody foreign wars and furious internal strife, but at the same time a period especially stamped with the most peculiar traits of Roman character. Of those characteristics their Jurisprudence had its full share. Without treatises, without art, without lawyers, like that of every country in its infancy, its forms and ceremonies were of the rudest, but at the same time, of the most expressive nature; yet it differed from that of other countries, in that it maintained its exclusive character, in spite of the difficulties it encountered, and in spite of temptations to amalgamate with other systems. It differed also materially from that of other nations and people, in the ease with

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which it adjusted itself to the internal changes that were constantly at work in Rome. It has been well said by an acute and powerful writer on Roman Law, that Rome's greatness was owing to the quick, lively political spirit by which she so renovated the power of her constitution, that the new merely administered to the development of the old. It was by a judicious mixture of the permanent, or conservative, and progressive reformatory spirit, that she was enabled to shape a constitution and frame laws that in time gave her the empire of the world. In the Law we find the Roman character strongly impressed. The history of that law exhibits everywhere a gradual, wholly organic development, a holding fast by long established principles and notions without being fettered by them—a happy power of seizing on a new and popular theory, and by adapting it to the old, of framing a fresh form, which thus became as matured and fixed as though it were old law.

Savigny—*Vocation of our Age for Jurisprudence.*

Even in the rude period, when these Actiones Legis flourished, is this system-

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atic development visible. Even before the great era of Cicero there were men who played their parts in the quiet reform and improvement of their jurisprudence as honestly, if not so skilfully, as Papinian and Ulpian in the golden days of the Roman Law.

I have said that each change and each epoch was characterised by peculiar features; I may add, that in every division of their jurisprudence, an analogy was preserved, and that through them all a unity of purpose and design is visible.

Characteristic traits of the Roman Law.

Thus the remarkable pre-eminence of the citizenship affects every branch of the laws, while the simplicity of juridical notions is evinced in the rude symbolical acts by which all judicial proceedings were marked, and which were tenaciously adhered to for a length of time, on account of the advantages derived from their palpableness. A brief glance at two of their early legal institutions will shew clearly these features—the spirit of exclusiveness and the love of publicity. In the one, that of property,

Of Property.

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without a knowledge of the mysterious privileges of citizenship we should have no right understanding of the different species of ownership, such as the Mancipium, and the possession Ex jure Quiritium, or whence arose the necessity for the introduction of a third form, the Bonitarian. Nor would it be easy to account for or explain the various modes by which property was transferred from one to another, such, for instance, as Mancipatio, and In jure cessio, if we had not seen, in the explanation of the ceremony given by Gaius, the remarkable publicity which it was required should accompany the transfer of property.

Of Contracts.

In the other legal institution, that of Obligations or Contracts, the strict observance of this publicity is equally visible, and under the name of Nexum, which was the earliest technical term for contract, a complete analogy was preserved between obligations and sales or conveyances, for no obligation was ratified by mere word of mouth, by consent, or bare delivery; in every case the fiction of a public sale was resorted

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to, and the presence of witnesses[1] was necessary.

If then such were the characteristic features stamped upon other institutions, it was not likely that Civil Procedure or "Remedy by Action" would be placed on a different footing; accordingly we find, that in the era of the Legis Actiones the three distinguishing marks were exclusiveness, publicity, and simplicity.

Of Civil Procedure.

Of these Legis Actiones Gaius enumerates and explains five[2]. Without entering into

The Legis Actiones enumerated. *Comm.* IV.

[1] Roman citizens.

[2] 1. The Sacramenti Actio, a genus of actions rather than a particular specific one, extending to every kind of business, even to those for which the law had given no other action. Here each party (plaintiff and defendant) deposited with the Pontifex a sum of money (Sacramentum) to abide the issue of the suit before the Centumviri or Judex, the sum so deposited by the loser was forfeited to the Treasury (pœnæ nomine). In the Orat. pro Cæcina, c. 33, and in the Pro Dom. 29, Cicero alludes to the formula appended to this Actio "Justum sit sacramentum an injustum."

2. Judicis Postulatio—of which we have no clear account, probably it was applicable to but a few cases, or used, as Zimmern suggests, to assess damages by means of a Judex.

3. Per Condictionem—where the plaintiff summoned his adversary to be present in order to choose a Judex on the 30th day (*condicere* was the old word for *denuntiare*).

4. Per Manus Injectionem—this, from Gaius's account, seems to have been rather a legal remedy for recovering on a judgment

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any detailed exposition of them, one or two of the leading political advantages of these forms may be pointed out.

Whatever might have been the authority belonging to the kings before the republican times, in deciding on suits brought before them, whether there was any separation made in their judicial and legislative functions, or whether, as Cicero says, "Jus privati petere solebant a regibus," and, as Dionysius asserts, not till Servius's reign was the office of Judex introduced; yet, in the days of the Republic, the offices of Magistrate and Judge were entirely distinct, and the Magistrate's duty consisted in granting a formula or process, and in appointing the Judex, or rather in sanc-

De Rep. v. 2.

Dion. Hal. IV. 25.

Distinction between Magistrate and Judex.

than an original action, deriving its name from the words in the formula that accompanied it, "ob eam rem ego tibi . . . . . judicati manus injicio."

5. Per Pignoris Capionem. This was a form partly customary and partly legal, differing in some important particulars from the other Actiones, such as being conducted, not "in jure," in the absence of the defendant if necessary, on any day whether fastus or nefastus, and in exacting a pledge from the opponent. On this subject see the notes in the Appendix to Linley's *Study of Jurisprudence* (pp. 32—35), a work which for clearness of explanation and precision cannot be too much praised; see also Gaii *Comm.* IV. 13—39.

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tioning the choice of Judex, made by the contending parties. Each of these proceedings had a technical name; that before the magistrate was said to be done In jure[1], that before the Judex was called a Judicium. The power of the Judex when so appointed was[2] entirely independent of the magistrate, though his position was rather that of an arbiter than a public officer[3].

Between In Jure and In Judicio.

From the decision of the Judex there was no appeal, nor indeed did any such measure exist among the Romans. For the Veto, which has sometimes been confounded with Appeal, was of a nature entirely distinct, the effect of which was to annul and put a stop to all legal proceedings, not to remit them to another hearing.

Walther. Preface, XIX.

It was only in a Republic, and among a people so exclusive as the Roman, that such

Position and authority of the Judex.

[1] Cf. the passage in the Oration Pro Publio Quinctio, c. 9: "Te Judicem C. Aquilli sumsit ..... Judicium esse non de re pecuniaria" &c.

[2] Provided however that the formula was strictly observed.

[3] A remarkable fact should be noticed here, that where the Quiritarian ownership was in dispute, the matter was heard, not before a Judex, but before the tribunal of Centumvirs, who were nominated by the Tribes (an instance of the exclusive Roman spirit).

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an anomaly would exist; an anomaly that may be cleared up, by remembering, that as each magistrate received his authority from and was an immediate delegate of the sovereign people, by virtue of that sovereign delegation he reigned supreme in his office, and was at once invested with a thoroughly independent power of action. Hence we have a clue to the apparent harshness with which a Judex was punished for negligence or imperitia[1], when, as was said, "litem suam fecit," because as there was no appeal from his sentence, it was necessary to protect the parties whose cause he decided, while, at the same time, to afford him due protection, skilled assessors, jureconsults[2], were permitted to sit by and direct him in points of difficulty.

Advantages of the office of Judex.

Autocratic as this office was, and to

[1] For such imperitia, he against whom the Judex improperly decided, had an "actio in factum," and the damages were left to the discretion of the person trying it. But if the Judex was guilty of dolus in his false judgment, then, in addition to damages, he suffered by a mark of disgrace. Cicero de Oratore, II. 75. "Quid? si, quum pro altero dicas, litem tuam facias."

[2] Thus in Quintius's suit three juris consulti sate as assessors—M. Marcellus, P. Quintilius, and L. Lucullus.

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our ideas dangerous as it may seem, it was so congenial to Roman notions[1] that it lasted for many years; the question then naturally arises, what were the advantages conferred by this institution?—they may be summed up very briefly under the double bearing, political and practical. Politically, it offered the advantages of simplicity and economy, good and prompt administration of justice, all opportunity removed from the magistrate of abusing his authority over individuals, by delegating part of his duties to another, while that other was purposedly placed in an independent post, and raised above those influences that too often act injuriously upon nominees of government. For he was the representative of the people, and as such was chosen, not because he was a skilful lawyer, not because he was a patrician, not because he was a partisan, but because he was an honest man, and a

1st, Political.

[1] And so much was it bound up with the Roman constitution as to be looked upon as an emblem of liberty, whose loss Cicero touchingly regrets in the De Officiis, "Extincto enim Senatu, deletisque Judiciis quid est, quod dignum nobis aut in curia aut in foro agere possimus?"

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man of business habits, one too, who might himself the very next day be in the position of one or other of the parties whose cause he was deciding. Nor was he placed in any technical difficulty in the discharge of his functions. The formula, which accompanied his appointment gave him full instructions, because it comprised a series of questions in which the whole matter in dispute had previously been arranged before the magistrate, and to which he was to answer yes or no. His decision or judgment could not go further than the imposing a pecuniary penalty, whatever might be the subject of demand; the execution of this judgment belonged to the magistrate.

2nd, Practical.

In a practical light this office offered equal advantages. In the first place it gave the Magistrate liberty to attend to the higher parts of his duty, the legislative functions, by disembarrassing him of that infinity of questions of detail which, by occupying time, would divert his attention from the higher business of the commonwealth; and secondly, it ensured a safe

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rapidity in the despatch of business, because two courts were sitting at the same time; in one the questions of fact, the yes and the no, were being sifted; in the other, the legal difficulties, that are ever a fruitful source of delay, were heard and decided.

This double court characteristic of the two æras of action.

I have dwelt thus at length on this separation of law and fact, this double court of Magistrate and Judex, on account of its being a clue to the history of the early Roman Procedure, as well as characteristic of the Formulary Process, or second æra, and of the Legis Actiones, or first, but above all, because it illustrates what I laid down before, as an important feature of the historical development of the Roman Law, that it is specially stamped with Roman notions, for it was a cherished principle with them, that none but a private citizen, chosen by themselves, should decide on the disputes of fellow-citizens.

The Legis Actiones.

It is fitting now that I make a few remarks on the Legis Actiones; I say few, because the forms of proceeding themselves are so

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ably explained in Mr. Linley's work that I need not waste time by dwelling on that portion of my subject.

The term 'legis actio.'

The term "legis actio" was a *generic* one, designating all the formalities of process then employed, but each of those formalities had a special name, drawn from the peculiar act that characterises it.

Vocatio in Jus.

In these early days all process commenced with the Vocatio in Jus[1], or the summons, by which the plaintiff cited his adversary before the magistrate's tribunal, on whose refusal to appear the plaintiff was allowed, in the presence of proper witnesses, to seize and conduct him forcibly "in Jus"—a proceeding in strict accordance with the

Tab. i. 4.

1st of the XII. Tables: "Si in Jus vocat, ni it, antestator, igitur em capito." The defendant could avoid this compulsory sum-

[1] It is scarcely necessary here to quote the well-known scene so graphically described by Horace, Serm. i. Sat. 9, v. 74, with the "Licet antestari," and the Plaintiff and the Defendant's rapid exit "in Jus" amid the cries of the crowd.

Plautus, in the Curcul. v. sc. 2, gives the formulæ both of the Vocatio and the Antestatio.

That women could be haled into court "in Jus," in the Decemviral times, is clear from Livy's narrative of Virginia, III. 44.

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mons, by offering a vindex to represent him, who took on himself the process. But defendant could not be seized and haled into court from his own house; for it was a maxim of Law, "Domus tutissimum cuique refugium atque receptaculum." D. 2. 4. 18. D. 50, 17. 103.

In after times the Prætorian jurisdiction introduced some important and salutary alterations in the roughness of these proceedings, protecting, by the penal action "de vi non eximendo," defendants from unnecessary violence in these summonses, and enacting that certain classes of individuals should not be summoned "in Jus sine permissu (Prætoris)." Prætorian alterations in it. D. 2. 7. D. 2. 4.

By the terms of the Condictio this primitive mode of compelling appearance was dispensed with, by means of the Vadimonium, or promise to appear either simply, under bail, by oath, or by nomination of recuperators. On failure of the party to appear at the appointed time, as Cicero, Pro Quinctio, says[1], The Vadimonium substituted. Cap. 14.

[1] That there is no mention of Vadimonium in the Digest is attributed by Heineccius to Tribonian's determination to prevent any recollection of this old form, by expunging it from all the ancient fragments. A comparison of the Collatio Moss. et

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"Vadimonium est desertum," and the magistrate, after thirty days' delay, had power to put the plaintiff in possession of the de-
Cap. 20. fendant's goods. "Ei," says Cicero, "absenti omnia fortunarum suarum, omnia vitæ ornamenta, per summum dedecus et ignominiam, deripi convenit." Such were the preliminaries that took place in Jure, and in this way the parties were ready to proceed by one of the five Legis Actiones. I think I have said enough to shew how thoroughly in accordance they were with old Roman habits and feelings. But whatever advantages this early process possessed, of bringing the parties at once into court, of coming rapidly to an issue, of separating law from fact, and deciding on both concurrently, and of obtaining judgment without delay; however agree-

Rom. Legum, Tit. ii. § 6, with D. 47, 10. 7, will shew that the term was really introduced into the Prætor's edict.

In olden times there was undoubtedly an express formula given to the Plaintiff for binding the Defendant to appear (vadari reum); and that some skill and learning were necessary in preparing it, appears from a passage in one of Cicero's letters, Ad Q. Fratrem, II. 15, where he speaks of Cæsar's satisfaction at Trebatius's presence, because he knew not "in tanta multitudine eorum, qui una essent, quenquam fuisse qui Vadimonium concipere posset."

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able it was to the suitors to have their questions of fact settled by one of themselves, a Roman private citizen; there were, on the other hand, grave obstacles to be encountered. For these forms ere long became oppressed with subtle technicalities; the application of them in practice soon was so beset with difficulties, from the nicety and the rigorous preciseness required in setting them out, that they were instruments of legal oppression, rather than of practical utility; and the truth of the proverb was evinced in their case, "summum jus summa injuria[1]." Many other influences were at work too to weaken the hold they once had on the feelings of the people. First and foremost the Peregrini were beginning to assume a position of importance; next, the

Disadvantages resulting from the Legis Actiones.

Influences at work to weaken them.

[1] Niebuhr maintains, and with much show of probability, that the real boon conferred by Cn. Flavius, and for which he was subsequently rewarded by the tribuneship, was the publication of each of these Actiones Legis simply and without commentary, in addition to the Calendar of Dies Fasti and Nefasti.

"Fastus erit per quem *lege* licebit *agi*,"—even the Poet was acquainted with the technical term, though the Legis Actiones had long since given way to the Formulary Process.

Niebuhr further maintains that Cicero knew well this Jus Civile Flavianum.

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jurisdiction of the Prætor was becoming more and more extended; the oppressions of the patrician class too, especially in the administration of justice, had produced a determined spirit of opposition, and a hatred that more than once nearly led to a sacrifice of nationality; while a race of men had been gradually coming into repute and notice, distinguished as much by the vigour of their intellect as by their influence in the state; I mean the class of lawyers, or jurisprudentes. These and other causes, such (*inter alias*) as the results of successful war against rich[1] and powerful neighbours, were gra-

[1] Such influences as these are most valuable aids in explanation of changes in laws and legislation of every country, on which many good books have been written.

Let me add to those above enumerated, the moral and physical effects, which resulted from the long Punic wars, viz.

First, the enriching of one class, the contractors, and the impoverishing of the old Cives, and consequently the introduction of an aristocracy of wealth; in time this ended in the loss of the old Republican simplicity and the destruction of the patrician class.

Secondly, a taste for wealthy ease and luxury.

Thirdly, the commencement of a love of letters.

And, fourthly, the establishment of a standing army and a conscription. As a general consequence old Roman notions were gradually being lost.

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dually producing an alteration of habits; exclusive nationality was beginning to give way to foreign intercourse; the old rough rugged notions were softening down; and the "Jus honorarium" or "Prætorian code" was making the benefit of its equitable improvements on the stern "Jus civile" largely felt. Hence the period was come for the destruction of the Legis Actiones. They had, for some time preceding the Lex Æbutia, and the Leges Juliæ, been decaying; when first is not precisely known. The death-blow was inflicted by the laws above mentioned; and therefore I now propose to consider the passage of these laws; in my remarks on which I may at once acknowledge how much every inquirer into this obscure part of Roman history is indebted to Heffter, Zimmern, and Laferrière.

Distribution of the Legis Actiones.

The Legis Actiones had become oppressive, from two causes; one, the tyrannical influence of the patricians, who alone knew these peculiar forms, and never divulged them; the other, the risk attending any mistake committed through inadvertence

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or ignorance. Two men, however, had done much to destroy these evils—Cn. Flavius and Sextus Ælius[1]: the publication by them of these strict and hitherto unknown forms, gave the public that vantage ground, which the patricians had usurped. Hence the latter, no longer having an interest in their preservation, ceased to care for their retention, and looked on their destruction with apathy. The Lex Ælutia, of which we have no remains, was passed undoubtedly with the object of making some changes in the Legis Actiones, somewhere about the end of the sixth or beginning of the seventh century of the city, but it did not go so far as entirely to abrogate them; for in Cicero's day, who certainly knew of this law, and who as certainly did not know the Leges Juliæ[2], some of the Actiones were still in existence as *e. g.* the Manus injectio

The Lex Ælutia.

[1] The Roman Chitty and Archbold of their day.

[2] I assume with Heffter that these were the Leges Juliæ, passed in Augustus's reign. Cf. Heffter, *Comm. in Gaii Institut.* Obs. cap. viii. p. 24.

Aulus Gellius, XVI. 10, tells us that these antiquated forms were disposed of (how he does not shew) by the Lex Ælutia, "nisi in legis actionibus centumviralium causarum."

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and the Pignoris capio, while the Sacramentum was then reserved for the Judicia Centumviralia. In all probability then the two forms of the Judicis postulatio and the Condictio were those aimed at by this law. A passage in the Oration Pro Roscio Com. shews us that the Condictio had disappeared and been displaced by the Formulæ, while, from some remarks in the same Oration (IV.), and in the De Officiis, we gather that he only knew of two kinds of separate and distinct judicia, the "Judicia Legitima" and the "Arbitria Honoraria," or Judicia decided, not by Civil Law, but by Prætorian forms[1]. Hence, adopting Heffter's careful summary of the objects of this Lex, we may assume them to have been twofold; one, to preserve intact to the Centumviri the Sacramenti Judicium in private suits, but to reserve questions De Libertate and Civitate for the Decemviri litibus judicandis; the other, to enable parties to proceed "per concepta verba," where

Cap. IV.

III. 15 and 17.

[1] To which Zimmern makes some objections: see his remarks at § 35, note 2.

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the Condictio and Judicis postulatio had formerly been applicable, and to give the Prætor jurisdiction in these cases.

The Leges Juliæ.

The two Leges Juliæ were passed in the reign of Augustus, one having reference to Judicia Publica, the other to Judicia Privata. Fragments of these laws have been preserved and commented on by various writers, such as Brissonius, Gravina, Sigonius, and others; one passage in them sufficiently warrants the assertion of Gaius, that thenceforth the Actiones Legis were to be destroyed: "De omnibus cæteris rebus, de quibus inter cives Romanos, in urbe Roma, intrave primum urbis miliarium, controversia erit, ... per verba concepta agatur."

Second æra. The Formulary Process.

We bid farewell then to these Actiones Legis, the representations of the rude simplicity of early Roman times; and we arrive at the second æra, that of the Formulary Process. In this part too of my duty I shall pass over the detail respecting these formulæ, which will be found in Mr. Linley's book, or better still, in Gaius's

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Commentaries; but I shall dwell a little on their characteristic traits[1].

In the first place, there were four important points of difference between the Formulæ and the Legis Actiones. They were verbal forms, not forms mixed up half of acting, half of speaking; they were separate and specific, not generic; *i. e.* they were individual cases, specially adapted to

Their first characteristic.

[1] For convenience sake I give a short explanation of them in a note.

The formulæ were legal forms adapted to each particular case brought before the Prætor; commencing with the Judicis datio, setting out the precise point in dispute, and directing the Judex, when he had ascertained the merits of the question, either to adjudicate strictly, or to act in such way as he thought most equitable. The Formulæ. Their parts.

There were four parts in every formula, in addition to the formal "Judicis datio" by way of commencement:—The Demonstratio, the Intentio, the Adjudicatio, and the Condemnatio.

The Demonstratio was the short, simple statement of the cause of quarrel, *e. g.* "Quod Aulus Agerius Numerio Negidio hominem vendidit."

The Intentio pointed out to the Judex to what end he should direct his inquiry, *i. e.* if anything, and what, was due to the plaintiff; as *e. g.*

"Si paret Num. Neg. Aulo Ager. sestertium x. milia dare oportere;" or it might be, "Quidquid paret N. N. A. A. dare facere oportere."

The Adjudicatio was the permission entrusted to the Judex of making such award in the dispute to one or other of the parties as he thought right: "Quantum adjudicari oportet, judex . . . . adjudicato; but the Adjudicatio was a form applicable

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each peculiar state of circumstances; not being dependent on the words or directions of the law, they were easily varied and adapted to use; and, lastly, they gave more scope to the decision of the Judex.

Their second.

In the second place, the influence of the Prætorian regulation was brought to bear upon them. For Gaius says, that during the reign of the Legis Actiones the edicts of the Prætors were not in use, whereas by these edicts many forms of action had now been introduced. Hence the Formulary Process had a double foundation—the Common Law, and the Equitable or Prætorian Law.

IV. § 11.

Cic. Pro Rosc. Com. 8. Pro Tull. 8 and 44.

Extension of Prætor's Judicial Office.

We shall find then, that in this æra the Prætor's judicial office was much extended, and that part of his duty was to transcribe

only to three Judicia; viz. familiæ erciscundæ, communi dividendo, and finium regundorum."

The Condemnatio was the power given to the Judex to condemn the defendant to pay, or let him go free.

"Judex N. N. A. A. decem milia condemna; si non paret, absolve."

The strictest observance of the directions contained in the formula was required of the Judex, under the penalty of "making the suit his own."

Sometimes a formula was not set out in full length, for those in "factum concepta" contained usually only an Intentio and a Condemnatio.

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from his Album, for the use of the Judex, what formula he thought suited to each case, and even to prefix the name of such Judex to that formula. Another important fact was, that all the formulæ, generally in use, were to be found in the Album Prætoris, and so within reach of everybody; while, in addition to that notoriety, when once the plaintiff had obtained a Judex and the proper formula, there was no need of further recourse to the Prætor, for the Judex then had power to enter up and enforce the judgment. At another part of this work I shall have to speak of the influence of the Prætor. On this subject I need only add, that the transition from the Legis Actiones to the Formulary Process was rendered the less violent, by the fact, that the formulary principle was the basis of each, but, from the excessive rigour and the technical difficulties of the former, the change to the latter was a welcome relief.

Cf. Lex Rubria[1], c. xx. Hawbold's Antiq. 146. Cic. in Ver. iii. 12.

[1] In which a formula is given at full length, applicable to the case of parties claiming redress for Damnum, whether Infectum or Datum.

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The Formulary process not a violent change.

A careful perusal of the history of the times within which these formulæ flourished, *i.e.* from A. U. C. 387 to Diocletian's reign, shews how strong a hold, even under the operation of the most powerful internal changes and external circumstances, the old Roman habits and early national traits had upon the people. That gradual development of the law, of which I spoke above, as one of the most remarkable features in the history of this people, is nowhere more visible than in this period. The changes that I have hastily delineated in the law of actions were not isolated facts in the history of their law, nor were they violent reforms, produced by violent counsellors. From the Legis Actiones to the Formulæ was a natural transition, because of the aid that was rendered by the Prætorian office, so from the Formulary Process to the Extraordinaria Judicia the progress was equally natural and gradual.

It is a problem somewhat difficult of solution, to account for the reasons of the con-

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stant improvement of legal institutions visible in most civilised countries in the midst of revolution and war. Thus in Rome, in England, and in France, that period of history which is most disfigured with war and discord is remarkable for the steady settlement of the law, and for the decided influence of its teachers. The period I now speak of at Rome illustrates this anomalous condition of facts. Treason and sedition displaced one great man after another. Forms of government were violently changed, as the boundaries of the state were ever enlarging themselves, and to the bystanders every circumstance pointed to the utter destruction of all those features that were so completely Roman; and yet the old institutions were preserved, in spirit and in name. One would have thought, that under the Reign of Terror of the Triumvirates, not only liberty, but law, would have vanished; that under the imperial rule, Prætor and Judex would have been merged in an arbitrary officer, nominated by the Emperor and subservient

Constant improvement of legal institutions at Rome.

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to his orders; but such was not the case. The Prætorship was extended far beyond its original limits, and long before the Formulary Process fell into desuetude, the four offices of the Centumvirate, the Judicium, the Arbitrium, and that of the Recuperators, were concentrated, and placed under the Prætor's direction, forming what was called the Ordo Judiciarius. There were however certain judgments, not taken in the ordinary way, but specially intrusted to particular magistrates for particular cases, called Cognitiones Extraordinariæ, and these extraordinary proceedings were all comprised under the general denomination of "Persecutiones in Rem vel in Personam." Of the causes which gave rise to these Extraordinariæ Cognitiones, the most important were, 1st, Proceedings against Tutores suspecti; 2dly, Proceedings relating to Fideicommissa (entrusted to special Prætors); 3dly, Proceedings relating to the improper decision of a Judex, "Qui litem suam fecit;" and, 4thly, Proceedings relating to defaulting and contumacious parties.

The Cognitiones Extraordinariæ.

D. 50. 16. 178.

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On their first introduction these Extraordinaria Judicia were unfrequent; but in course of time, and under the influence of new legislation, they came much into vogue, especially when the Emperors themselves sat as judges both of appeal and in original causes. But it was in the provinces that the extension of these Judicia was most felt, for Julianus the lawyer declared, that the power of the Præses Provinciæ to send a suit to the Judex, or try it himself, dates from the second century of the Empire. The introduction of a Provincial President, with tribunal and regulations to aid him, was one of the great changes of Roman notions; and thus the revolution, that was silently at work in one of their institutions, was preparing the way for an important change in another. Extraordinaria Judicia.

It may be worth while to consider, a little more fully, how this period of procedure was arrived at, and how the old forms were at length entirely discarded. It will be seen then, that the first step towards this result was in the distinction How arrived at.

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between the ordinary and extraordinary procedure; because by that a new principle was introduced, of suiting a form of proceeding to the emergency of a particular case, by referring the case itself to the Extraordinariæ Cognitiones, and thus, whenever necessary, disregarding the compulsory enactments of the law.

The old forms got rid of.

This step once taken, all the rest easily followed; and soon civil process became disencumbered of all the old solemnities, as it had been by means of the formulæ of all the old pantomime; the Judex was got rid of for the Prætor, who at once heard and settled the plaint, (cognoscebat), and though a new class of Judices pedanei had been introduced after Diocletian, they were as free to decide, unencumbered by formulæ, and unfettered by any technicalities, as the Prætor himself. At length even the Denunciatio, last relic of antiquity, disappeared, or was removed as tedious and useless in Justinian's time, and nothing more was necessary to bring the matter at once into court, than a short statement of the cause of action, called Libellus.

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Thus then we have traced historically the changes in this branch of the Roman Law, which (like the life of man) has three aspects, the time of childhood, or rather of a rough and strong boyhood, marked by a love of freedom, and a rude simplicity, when the law was but a collection of pantomimes and symbolical acts, though completely in accordance with national traits. The period of manhood, when the old simplicity was disdained, and the ancient forms were unfitted for the progress the people had made in arts and letters. And the commencement of old age, when nationality was fast disappearing, and when the law, instead of being part and parcel of the people, was becoming a system, which if more refined, was certainly less vigorous. Recapitulation.

To trace the law of a nation like the Romans systematically, to compare it from time to time with their thoughts and feelings, and to bring the inquiry into one to bear upon the history of the other, is ever a useful lesson. For historical investigation is never so valuable as when it throws light

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upon the moral and intellectual changes of a great people. Those internal causes, that are ever silently but unceasingly at work, are often more worthy of research than the better known external influences that are visible to all. Thus it may be easy to account at once for many alterations in the histories of nations, by such facts as foreign conquests, change of government, increase or decrease of numbers, and others of that sort; but to account for the long hold of old habits and the difficulty attending the formation of new ones, to give a reason for self-introduced changes in institutions and laws, is a task of another kind, which, if more troublesome, will often be found to be more productive of valuable results; because it is a dissection of the nobler parts of a great people: it is an investigation, that enables us to trace the causes of the decay of all their faculties. The real object of all such history should be (to use Savigny's words) "to trace every system to its root, and to discover an organic principle, whereby that, which still has life, may be separated from that which is lifeless."

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CHAPTER II.

On the Office of the Roman Magistrate and Judge, at various times.

In the early days the kings had judicial power; not only in the adjudication of property and persons, but even in the assigning of a Judex, at least so Dionys. x. 1. Hal., Cicero and Pomponius assert. The powers so conferred upon them were termed Imperium, and were afterwards inherited by the consuls[1]. But in the year A. U. C. 387 a new office had been established, that of the Prætorship; and later still, that is, in the 6th century of the city, a Prætor

De Rep. II. 21, v. 2. D. 1. 2. 2. 2.

The Prætorship established.

[1] And not only the consuls, but all who presided over the republic with consular power; *e.g.* the decemvirs and the tribuni militum. Livy, II. 27, speaking of the consul Appius Claudius, says: "quam asperrime poterat, *jus de creditis pecuniis* dicere," and in Lib. III. 33, adds that the decemvirs "decimo die jus populo singulos reddidisse."

(It is necessary carefully to keep in mind the distinction between the superior and inferior magistrates.)

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Peregrinus was elected with the Prætor Urbanus[1].

The Jurisdictio transferred to the Prætors.

As soon as the Prætorship was firmly established, all the Jurisdictio, that till then had been enjoyed by the consuls, was trans-

Imperium, Jurisdictio, Potestas and Decretum.
D. 2. 1. 3. 47. 10. 32. 5. 1. 12. 1. Cic. de Leg. III. 3.

[1] It will not be out of place to introduce here an explanation of two terms, that from the very first period of Roman law, were technically applied to the magisterial office, as well as of one or two other legal expressions peculiar to this part of the law—I mean Imperium and Jurisdictio. In its widest sense Imperium, which is identical with Potestas, was used to indicate all the authority belonging to the superior magistrates, and therefore comprised the Jurisdictio, while the term Jurisdictio was applied by the Roman lawyers to the sum total of those powers possessed by the magistrates in *litigations*, and other judicial relations between individuals; every thing that related only to process, such as declaring a form, and naming a Judex, being but a part of this Jurisdictio.

D. 1. 21. 1. 1.
D. 1. 21. 5. 1.

There were, however, two kinds of "Imperium," the "mixtum," and the "merum." The "merum" designated the magistrates' judicial authority in criminal matters, and scarcely ever took the denomination of Jurisdictio. By the "mixtum" was understood the full authority with which the Roman magistrates, who had Jurisdictio, were invested.

Now the Jurisdictio consisted "in decretis interponendis, dijudicandisque causis;" or, using the three well-known terms, "dando, dicendo, addicendo." A Decretum, in its narrowest sense, signified every decision made after an examination, which was the notion of the word in the Imperial times; though probably in a more extended view it comprised every decision rendered by a magistrate with or without any previous investigation. Another term applicable to jurisdictions, and requiring explanation, is "cognoscere," by which is meant the examination of any business, or the conduct of a legal proceeding before a magistrate, or even before a Judex.

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ferred to the Prætors, though the Ædiles also exercised a certain jurisdiction in the affairs of police and commerce. From the domestic the step was a natural one to that of a provincial Prætorship, invested with the same Potestas and Jurisdictio[1]; and as the value of this office was soon felt, the number of Prætors was increased at Rome. I shall therefore linger a while, to sketch as briefly as I can the real influence that this new magistracy conferred upon the legal institutions of Rome, more especially upon that branch with which we are now engaged. From the accounts we have of the early history of the Prætorship, especially from Livy's, its creation, in the year A. U. C. 388,[2] appears to have been the result of a compromise on the part of the plebeians with the patricians, in return for the concession of a plebeian consul; 163 years afterwards Livy mentions the election of four, from

Liv. xxiii. 30. 32. D. 1. 2. 2. 32.

[1] Though 100 years afterwards they were changed for pro-Consuls and pro-Prætors, that is, Consuls and Prætors whose time of office had just expired.

[2] According to Ju. Lydus, the Prætor Peregrinus was first chosen B. C. 263. "Peregrinum, *i. e.* Peregrinos recipientem (*ξενοδόκος*)".

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which it is clear, that the value and importance of these officers had gained ground, and as in the year 418 A.U.C., or 30 years after their first introduction, a plebeian Prætorship was established, we may conclude that each of the contending parties in the state viewed the measure with favour, and that an office brought into being from party motives alone, had soon come to be prized as a national boon. The limits of the Prætorian jurisdiction were, from the very first, clearly marked; not, as Pomponius asserts, to supply the place of the consuls in the state when engaged in war; but, as Livy says with truth, actually to receive that Potestas (Juris dicendi) which the consuls hitherto had had, and which thenceforth was transferred from them. In short, to be, what in time it really was, the most important legal tribunal in the city, and by and by in the provinces, whose presidents were the Στρατηγοὶ ἐπὶ τῶν Ξενῶν, "inter cives et peregrinos jus dicere," by whose aid the ancient civil law soon became modified and softened; and who introduced

The Prætorian Jurisdiction.

D. 1. 2. 2. 27.

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a Jus, side by side with it, not in hostility to, or contradiction of it, "quod adjuvaret, suppleret, corrigeretque jus antiquum propter utilitatem publicam." But that these eulogiums are truthful expressions, and that the great value of this institution is not an imaginary one, resting on the flattering assertions of national writers, I have now to shew: that is, how this important position was obtained, and what was the real influence of the Prætorian courts on the Jus Civile, as well as on the department of Procedure.

Roman and English Equitable Courts contrasted.

There are no countries, the history of whose legal institutions and judicial proceedings furnishes more remarkable coincidences (and in many places direct resemblances) than Rome and England. Among those coincidences, the origin, progress, and development, from a single individual to a great tribunal, and a fixed body of law, of their equitable courts, is one of the most noteworthy, and one that deserves a lengthened narrative; on it, however, I have now no time to dwell. The only fact I wish here to notice is, that in each country a

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common law was already firmly established, and jealously protected; and in each its rules and regulations were so inelastic, and so manifestly unable to develop with the development of the times, that a change was absolutely necessary; such change was produced in one and the other country by the same means, viz. the influence of a new court, capable of making its decisions suited to the real wants of the suitors that appeared before it. At Rome (for my business now is with her alone), at Rome the Jus Prætorium or Jus Honorarium, had at the outset a very narrow foundation. It began with the right that the Prætors derived from the Lex Cornelia to make an edict; in which it was their wont[1] or their duty, to establish a rule to be observed in every case of a certain nature, during the administration of the office. But gradually growing with the growth of the nation, in Cicero's time it rivalled the fame of the twelve tables, and was adopted as the ground-work of all

Origin of the Jus Prætorium.

De Leg. I. 5.

[1] Cf. Cic. de Fin. II. 22: "Quum magistratum inieris et in concionem ascenderis est tibi edicendum quæ sis observaturus in *Jure* dicendo."

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law studies; until at last it was elevated into the dignity of a code in Hadrian's reign, and was termed Edictum Perpetuum. At the same time it should be noted that it never interfered with the Jus Civile, or altered its regulations; for the Prætor, says Cicero, "Juris Civilis est Custos:" the Prætorian law, to use the words of Marcian, "Viva vox Juris Civilis est,"—very little is necessary to prove this. In the Roman people alone resided the power of making laws, and conferring the Potestas, or Imperium. This Potestas they delegated to any magistrates they pleased, among whom were the Prætors, nominated by them in the Comitia; as these therefore were in direct connexion with the people, and independent of the senate, or of any overruling aristocratic influence, it was not likely that such a magistracy, created in the palmy days of the republic, when the old forms were still preserved, and the Decemviral code was held in the highest honour, would have acted against the principles of that law, especially as they never had power given them "condere

And progress.

De Leg. III. 3.

D. 1. 1. 8.

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legem." Still it is an undoubted fact, that the edicts of successive Prætors soon grew into a body of law, distinct from the Jus Civile, and side by side with it; and the
II. 1. 44. words of Cicero in the Orat. in Verr., shew how wide-spread its rules and maxims were: "Posteaquam Jus Prætorum constitutum est semper hoc jure usi sumus, sed in re tam usitata, satis est ostendere omnes, antea jus ita dixisse, &c."

Interesting and instructive as the full development of this institution is, I must perforce pass it by, in order to hasten to that portion with which we are just now most concerned; that is, the direct influence of the Prætorian edicts on the Law of Actions; and here too I go at once to the formulary æra.

Influence of the Prætor in edicts on the Law of Actions.

The immediate result of the Lex Æbutia, on judicial proceedings: was, as I have before mentioned, the introduction of verbal forms, "concepta verba," adapted to the particular set of facts in dispute. These forms, be it remembered, were drawn from the Prætor's edict, in which a large store of

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them was preserved, and added to from year to year, carefully and elaborately prepared.

Especially on the Intentio.

Now of the three elements contained in the formula (the Demonstratio[1], the Intentio[2] and the Condemnatio[3],) the Intentio is the one that more immediately concerns us at present, because it was on this essential part of the formula that the division of actions into "directæ" and "utiles" was founded, and because the Prætorian courts, seeing the opportunity, offered by the latter class, of extending the benefit of the formulary process to a variety of claimants, hitherto deprived of legal remedies, seized them, and adapted them to their purposes.

Now the Intentio had a double aspect, according as the plaintiff made a claim to something, by force of the Jus Civile, or Jus Quiritarium, or by help of the Prætor's jurisdiction; in the one case the formulæ granted to set forth the cause of action were termed

[1] The statement of the cause of action.

[2] The plaintiff's demand, whether in law or in fact. Of this Intentio there is a capital example in the Orat. Pro Rosc. Com. c. 4.

[3] The power given the Judex of finding a verdict.

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"formulæ in jus conceptæ;" in the other "in factum conceptæ;" and in time, the actions thus arising were termed "actiones in jus" and "actiones in factum."

The former of these, framed on the Jus Civile, were not capable of any development, but it was otherwise with the latter, for as early as was possible, they were resorted to in aid of individuals who were unable to use the privileges of the old law, not because they were Peregrini, but because they were under the power of another, as *e.g.* Filii familias. The action "in factum," thus applied, was called Utilis; the benefits of such an elastic process as this was at once perceived by the Prætorian courts, nor were they slow to make use of it, and to apply it even to cases not hitherto foreseen by the edict. In course of time a further application of these Actiones Utiles was made, not only to actions "in factum," but even to actions "in jus" by "formulæ fictitiæ," in which the Prætor instructed the Judex to decide, upon the assumption that any such conditions of the Jus Civile, as were wanting,

Formulæ "In factum conceptæ."

Actiones Utiles.

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and seemed necessary, did actually exist. Here then was an important revolution in the doctrine of pleading at once introduced; not by positive enactment, because if done in that way, much of the old law itself must have been abrogated, and for that there was no wish; not by a hostile jurisdiction, aiming at a successful rivalry with the old common law, for that would have ended in the destruction of one or the other; but by the application of new ideas to old forms, so happily made as to extend the influence of one, and to renew the life of the other: this then was one portion of the Prætor's mission, and how far it was beneficial to the Law of Actions is clearly evinced in the additions made to the remedies for injuries, which hitherto had in many instances been inapplicable to a large class of cases, and in the use of which a great body of individuals was restricted.

Introduced a change in Pleading.

But another, and even greater innovation and improvement arose out of the introduction of interdicts, and which more especially belongs to the Prætorian juris-

Interdicts.

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diction. I propose now to say a few words about their origin and early history, acknowledging, at the same time, the aid that I, in common with all whose studies are turned to this part of the Roman law, have received from the investigations of Niebuhr, Savigny, and Hugo.

Value of Niebuhr's researches.

Of all the writers on the ancient glories of Rome, it may be said without contradiction, there is not one who was animated with a greater zeal for his subject, or a more earnest desire to solve the difficult problem of Rome's rise and progress, than Niebuhr; nor has there been any writer who has done so much for the development of the history of that mighty people, whether in consequence of the light his own discoveries have thrown upon a tract of land hitherto dark and dismal, and stretching away into barren nothingness; or whether in consequence of the direction he has given to the researches of others, striving to explain his theories or account for his conjectures. To say nothing of the aid he has afforded to the student of history, in tracing out the Roman character

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in all its detail, in exposing to view "the childhood and youth of the heroic city," and in solving problem after problem of its history and legislation; the student of Roman law owes him a deep debt of gratitude for his acute analysis of some of the most difficult questions in it. Whatever may be the defect of his works (and what great mind is free from errors?), still they will ever be rich store-houses, to which all who would trace the Roman laws to their sources must resort.

Acknowledged by Savigny and Hugo in the early history of Interdicts.

It is not surprising, then, that Savigny and Hugo have each acknowledged the value of his labours, and approved the justice of his remarks on the laws of Rome; nor that in this particular part of my inquiries, Savigny adopts the explanation offered by Niebuhr of the origin of these Interdicts, of which I intend to give a short summary.

Nieb. Vol. II. p. 149. The Ager Publicus.

Whatever advantages the possession of a portion of the Ager Publicus offered to those who obtained it, in the early times its transfer was attended with this difficulty,

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that it had not any of the remedies, that were given to secure every other kind of property; that defect was supplied by the supreme power, which conferred the Ager, by means of the possessory interdicts; their connexion with the acquisition of the Ager is proved by Cicero, indirectly by Dionysius, and, according to Festus, by the words of the old edict preserved by Ælius Gallus. Other grievances also were remedied by them, especially those of absentee possessors being ousted, without their knowledge, (clam), from land not sufficiently protected by the law. To the case of possession of articles of private property, they were not so commonly applied, because there were remedies there, which could be obtained with a little trouble; hence, as the provisions of the perpetual edict are principally devoted to questions and regulations concerning the domain, and as the interdicts, both in the Pandects, and in Ulpian's fragments, stand next to them, it may be assumed in confirmation, that these latter related originally to the public lands.

Cic. contra Rullum, III. 3. Dion. VIII. 73, X. 32.

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From this view Hugo and Thibaut both dissent, but the former offers no argument in support of his disbelief, and the latter, while he does not absolutely condemn the opinion of Niebuhr and Savigny, refers to some passages of the Code in opposition to that opinion, which scarcely, if at all, throw any light upon the point in dispute[1]. Be their origin what it may, their importance is testified by the careful explanation of them given by Gaius and Justinian, by the position they occupy in the Digest, and by the frequent allusions to them in the classical writers[2] of Rome, and therefore I do not hesitate to consider their nature, their object, and their classification.

See Thibaut's System des Pandekten Rechts, Linley's ed. p. 56.

Gaius, IV. § 135. Just. 4. 15. D. 43. 1.

History of Possessory Procedure.

We have seen in the former part of these pages how the ordinary forms of Procedure were freed from the rigorous technicalities and solemnities that tied them down. It was not likely that Possessory Procedure, or suits to obtain or recover

[1] Zimmern partially adopts Savigny's and Niebuhr's theory, though he imagines that some such remedy existed before the Prætorian era, and was shaped into the interdicts by those magistrates.

[2] Cf. especially Cicero pro Cæcina, passim.

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possession, would be behindhand in losing the dramatic forms and fictions, the "inanissima prudentiæ" that surrounded and clogged them. The interdict "uti possidetis" and "utrubi" took the place of the old fictitious combat in suits involving possessory rights. They were assimilated to what were termed mixed actions, because each party was in the position of a demandant, but at the same time they were of a personal nature, although conceived *in rem*. As possessory suits, then, they had no connexion with other interdicts, beyond that of a common procedure, and being founded on the possession of the plaintiff they assumed as their condition, that the plaintiff had actually acquired a Jus possessionis; therefore it was the business of the plaintiff to prove the existence of the possession in his person: in considering which, Savigny maintains that the Judex, having to look to all the circumstances of the case, would direct the plaintiff's proofs to that particular time, when the possession was acquired,

Cic. pro Mur. c. 12.

D. 44. 7. 37. 43. 1. 1. 3.

Savigny, das Recht des Besitzes, § 37[1].

[1] See Sir E. Perry's translation.

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in order to form a presumption, as to its continuance up to the day, when the claim was brought before him.

In their nature then these Interdicts were possession-suits, *i.e.* legal modes of protecting possession; what their object was may be seen from contrasting them with the Actio. The essence of that consisted in the previous enunciation by the Prætor, that he would appoint and instruct a Judex to determine them, (assuming that the point in dispute was a question of fact), for every preliminary question of law was settled by the Prætor himself. On the other hand, in the Interdicts there was no mention of a Judex, but of an immediate order, or prohibition of the Prætor, who at once stated the law contained in the edict in the presence of both parties[1]. If

Interdicts.

[1] Thibaut maintains that the interdict was distinguished from the action by being a summary process. A statement that ought not to be extended into an exceptionless rule. If the defendant acquiesced at once in the terms of the order, then the process was undoubtedly a summary one; but if he refused to accept the terms, and demanded an arbiter, the process was then as dilatory as that of the action, and a host of technical difficulties might occur. In proof of this, compare Gaius's Com. IV. § 165.

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then the defendant admitted the plaintiff's demand, the order was made, and the matter was at an end, but if the defendant brought forward exceptions, or traversed, then a Judex or Arbiter was assigned, and then came a formula, and the instruction of a Judex; and therefore, as Savigny says, we may see why interdicts are looked upon as Ordinaria Judicia, and why interdicts proper disappear with the whole Ordo Judiciorum: for the old interdicts were formal decrees intended to serve as an introduction to a formula, and as instructions to a Judex. Before I proceed then to classify and arrange the interdictory process, I will briefly sum up the leading features of this ancient and difficult branch of the Roman Law of Actions.

Their introduction.

The true principle on which their introduction is grounded, undoubtedly, was the social need of public protection against acts of fraud and violence; whether, as in the case of possessory interdicts, considered with reference to the Ager Publicus, or intended to be a check upon Clientes and Coloni refusing to give up a possession, simply precarious,

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or established as a general permanent institution, in accordance with the recognised maxim, that it is the business of every good citizen to abstain from taking the law into his own hands, and to appeal to judicial authority for aid. In time they became authoritative orders; sometimes prohibitory, sometimes restitutory, and sometimes exhibitory, established in the Prætorian Edict as a permanent part of the Jus Honorarium, and attached emphatically to the Prætor's jurisdiction, by whom alone their special application could be directed.

Gaii Com. IV. §160, &c.

In classifying them, the grand primary division is that, which has relation to their efficient cause, the authority that sets them in motion—the Prætor—and here we see them in a threefold aspect[1], as prohibitory, as restitutory, and as exhibitory injunctions. The prohibitory interdicts wore the appearance rather of penal judgments[2], than mere authoritative directions, and are branched

Classification of Interdicts.

[1] Considered simply as authoritative orders they are properly termed "Decreta."

[2] See Hugo's Hist. of the Rom. Law, I. § 255.

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into two classes—non-possessory and possessory. The intention of the non-possessory was to prevent the infraction of rights of possession belonging to others, whether to a state, a corporation, or an individual. The intention of the possessory was to preserve to the plaintiff[1] his rights of possession, which he already had, by the two general interdicts[2] "uti possidetis," and "utrubi," as well as by certain other special ones.

The restitutory interdicts were intended to restore an individual, to that position, with regard to his rights, of which, he maintained, he was deprived; and therefore their aim also was twofold, according as the claimant sought to recover back his rights in a thing, which were temporarily and wrongfully withheld, or as he sought to make out a title to something, of which he had hitherto not had the possession. Therefore these interdicts are classed as "recuperandæ," and "adipiscendæ possessionis," to

[1] Retinendæ Possessionis.

[2] The first applicable to immoveables (nec vi nec clam nec precario possessæ), the second to moveables.

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the first of which belong those "unde vi aut clam," "de vi," "de precario," and "ad exhibendum;" to the second, those "quorum bonorum," "sectorium[1]," and, above all, the "salvianum[2]." The Exhibitoria[3] were, according to Justinian, in the nature of peremptory orders, issued by the Prætor, to produce to the view of the Court any person or thing, about which there was a disputed claim. These interdicts were most frequently applied for by a Paterfamilias, or a Dominus servi, and therefore we find under this class those, "de homine libero exhibendo," "de liberis exhibendis," "de uxore exhibenda ducendaque," still the production of moveable property might also be conferred in this way, as in the case "de tabulis exhibendis." I. 4. 15. D. 43. 30.

It is unnecessary to proceed further in explanation of these interdicts. My prin- The advantage derived from the extension of the Interdicts.

[1] The Interdictum sectorium was a special one given to those who bought "publica bona," who were termed Sectores. Gaii Comm. IV. 146.

[2] The Salvianum was given to the owner of a Fundus or country estate against his tenant Colonus over such property as the Colonus had agreed to pledge as surety for his rent (Mercedes).

[3] Exhibere est in Publicum producere et videndi tangendique hominis facultatem præbere. D. 43. 29. 3. 8.

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cipal intention, in dwelling upon them thus far, was to shew, first, that some equitable addition to the comparatively few and narrow remedies of the old common law was required, "ex necessitate rei;" and, secondly, that, but for the establishment of a Prætorian jurisdiction, unshackled by the restraints of old and unelastic forms, and armed with full freedom of action, such equitable remedies as these, however urgently needed, could never have been so sufficiently supported, as to become recognised law. The extension of remedies to all classes, and embracing all claims, belonged to the Prætors' province. Skilfully and usefully was that portion of their duties performed, and without attempting to oust the jurisdiction, or rival the authority of the Jus Civile, they so polished the rough body of that law, and brought into harmony the "disjecta membra" of legislative enactments, and customary observances, as to build up gradually a code, the benefits of which have been felt in our days, and the regulations of which have been incorporated in the rules and decisions of our own Courts of Equity.

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I purposely abstain from any notice of the other superior magistrates in Rome, because their official labours were not connected with that province of the law, with which I am now engaged; but I deem it right, before advancing to the remaining portion of my present task, to say a few words, on that very important branch of the higher magistrates' authority, the Jus edicendi, and to shew what influence it exercised upon the whole body of the law.

The Jus Edicendi.

Such a constitutional power as this, though not conferred by any positive fundamental law, (for it was founded on ancient customary observance, not on statute,) was, in addition to its utility, a matter of necessity. It was a useful custom, because, for all those, who appeared as suitors in Court, the leading principles by which each magistrate meant to be guided in his year of office were published. It was a necessary one, on account of the insufficiency of the Jus Civile, and the constant enlargement of the Jus Gentium, owing to the increased influence of the Peregrini, and the extension of

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commerce. Armed with this Jus edicendi, the Prætors were, so to speak, armed, indirectly, with the power of enlarging and improving the laws. If in each edict some principles crept in, whose advantage was not always confirmed by experience, no great mischief could permanently result from that; for as these edicts were "annuæ leges," every succeeding Prætor might strike out any portion of his predecessor's maxims, that did not meet with his approval: whilst, on the other hand, as he had full power to retain all he pleased, in process of time a volume of law grew up, forming part of the Jus scriptum, invested with authority, and causing the Jurisprudence of Rome to advance in a constant, steady, and uniform progress of equity. In this way the Prætorian courts were enabled to bring their principles in harmony with those of the Civil Law, and this is what the ancient lawyers mean, when they say, "Jus Prætorium Prætores introduxisse adjuvandi vel supplendi Juris Civilis gratia[1]."

[1] It should be borne in mind that Rome was the common country of all citizens who, wherever they had hitherto resided,

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were subject to her jurisdiction on their arrival there. Cf. Gell. XX. 10 (sed postquam Prætores, &c.) D. 4. 2. 3. 1. D. 48. 2. 12. Pr. The cities of Italy having been already made *municipia*, and having thus obtained incorporation with Rome, were invested with an almost complete administration of their own interests. (Cic. contra Rull. II. 34. D. 39. 2. 4. 3 & 4. C. 12. 1. 16.) In which the presiding Magistrates, called Duumvirs, or Quatuorvirs, had full power of jurisdiction—Magistratus juridicundo. In some cities a Præfectus Juri dicundo presided, but they were exceptive cases, and were called *præfecturæ*. (Liv. 26. 16. Cic. ad Div. XIII. 11.) Egypt being a conquered country and a *province*, the laws there were administered by a Præfectus who, though not really a Roman Magistrate (Tacit. Ann. XII. 60), had the Legis Actio given him as part of his voluntary jurisdiction. (D. 40. 2. 21.) In Alexandria a Juridicus was joined to the Præfect, who also had the Legis Actio, as well as the Tutoris Datio, by a constitution of Marcus Aurelius. (D. 1. 20. 1.) In the reign of this emperor the power and influence of the Prætors were diminished by the creation of Viri Consulares to preside in the four districts into which Italy was divided.

Savigny, in his *Geschicte des Romischen Rechts in Mittel Alter*, has most ably handled this topic. See Cathcart's translation of the first vol. chap. 2.

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CHAPTER III.

Of the Inferior Judges.

I HAVE now to speak of those Roman Judges[1] who, though far inferior to the dignitaries I have lately treated of, yet played a very important rôle in the proceedings by Action. Of these the most noteworthy are the Judices, the Recuperatores, the Centumviri, and the Judices Pedanei. For the earliest account of the first of these we must go back to the Actiones legis, and the Decemviral Code, where we find mention made, not only of a Judex, but of an Arbiter. The Judicis Postulatio was one of those Actiones[2]. A

The Judices.

[1] It is difficult to find an apt English expression for these officers: in some respects they correspond, though very slightly, to our jurymen, but in others they differ *toto cœlo*, as will be seen in the course of these pages. The English functionary they most resemble is the Judge of a County Court.

[2] Whether there was to be any real difference between the functions of Judex and Arbiter probably depended on the case itself; in Cicero's time this distinction was not very precisely marked. Pro Murena, c. 12, fin.

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law of the Twelve Tables speaks of a Judex, or Arbiter, and of three Arbitri. The existence of the Judex, as a necessary part of a civil suit, did not cease with the era of the Legis Actiones, it was preserved in that of the formulæ, "Judex esto" being the proper formal commencement of the Prætor's directions, never "Arbiter esto;" for whether the individual, thus appointed, was to act as Judex or Arbiter depended on the contents of the formula. If, however, Recuperatores were desired, and not a Judex, then the formula ran, "Recuperatores sunto." Whatever the appointment was, whether Judex, or Recuperatores, it was merely temporary, ceasing with the termination of the suit which called them into existence, and in which they acted solely by the consent of the parties themselves.

Gell. xx. 1. Cic. de Leg. i. 21.

Gaius, iv. 46.

Cic. pro Cluent. 43.

The influence of the Plebeian element was scarcely felt, in the times when first the Judices were created, for although the efforts of Servius Tullius had given some degree of social organisation to the Plebeians, and a Centumviral Tribunal was erected,

The Judices.

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yet it was a long time, ere the Roman people shook off the hold, that the Senate, and the Patrician body had got on the Judicia and the Judices; but they did eventually introduce a Plebeian element into the Decuriæ Judicum. The list of these Decuriæ was prepared annually by the Prætor, and fixed up conspicuously in the Forum, he taking an oath not to admit any but men of repute into the list, (Judices selecti et in albo relati). At first their number was 300; this was afterwards increased by Augustus to 1,000, and this again to several thousands. The nomination by the Prætor in the Formulæ was all that was necessary to render an individual a Judex. He could not decline the office (for it was a public duty) save by special privilege, or by some legitimate excuse, or from some legal incapacity. On his nomination he took an oath to discharge his duties faithfully; and, if he was not a

Cic. pro Cluent. 43. Phil. v. 5. Hor. Sat. I. 4. 123.

D. 50. 4. 18. 14. D. 50. 5. 13. 2 & 3. Cic. Phil. v. 5. D. v. 1. 12. 2.

[1] Note the phrases "Sumere Judicem," Cic. pro Flacc. 21, pro Quinct. 8, the acceptance of a Judex by the parties: "Regicere ejerare Judicem," Cic. in Verr. II. 12, the rejection of the Judex appointed by the Magistrate: "Judicem ferre," Cic. de Orat. II. 70, pro Rosc. Com. 15, the special nomination of a Judex by the parties.

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lawyer, he was permitted to obtain the assistance of one as his adviser, as also, sometimes, of the magistrate who nominated him. In Cicero's days, and during all the formulary era, the seats[1] of the Judices were surrounded by such skilled advisers, to whom, in general, the arguments of the counsel in the cause were directed[2].

Pro Quinct. C. 1. 2. 6. 10. 17. Pro Rosc. C. c. 8. Gell. XIV. 2.

The sentences of these Judices and Arbitri were termed, generally, Judicia privata, but there was this distinction between them, that as the Judices had cognizance of debts and obligations of a certain fixed value, their decisions were in strict accordance with the subject in dispute, while those of the Arbitri

Judicia privata.

[1] Called Subsellia, the locality was the Forum or Comitium, or Consueta loca, which were always public. D. 5. 1. 59.

[2] Whether the Judices were allowed to decide in questions of law is a moot point—though, on the authority of Zimmern and Walther, I should say they were not. A French writer of repute, M. Laferrière, imagines they were, and cites Cicero de Orat. 1. 38, 39, in support of that view. The first of these passages, however, will scarcely support his position, that in the Judicia the Judices decided questions of law; and in the second passage a distinct difference is made between the proceedings In jure, (*i.e.* before the Prætor,) and those In judicio—an interpretation of Cicero's meaning that Brissonius adopts. Cf. Briss. *sub verbo* "Jus."

Adopting this view then they differ very materially from our Judges of a County Court.

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were not so rigorous; they were not bound, as the Judices were, to find all or nothing, but, as Festus explains it, "Quantum æquius et melius, id dare." Moreover these Judicia privata were either Legitima or Non legitima, according as they were delivered in Rome, or within a mile of it, by a single Judex in a suit where none but Cives Romani were the parties, or as any of these conditions were wanting.

Cf. Cic. pro Rosc. Com. 4.

Gaius, IV. 103. Cic. pro Rosc. Com. c. 5.

The Recuperatores.

The functions of the Recuperatores may be very briefly dismissed, for they also were given by the Prætor on the application of the parties In jure[1], but their office was confined entirely to the settling the rights of the claimants to a Res (rei persecutio) and to adjudging the recovery of the thing in dispute to one or the other in such matters as required a prompt decision.

Gaii, IV. 185. Cic. Div. 17.

The Centumviri.

The Centumviri formed an important

[1] In a fragment of Gallus Aquilius, the expression "reciperatio" refers to the settlement of public property between Cives Romani and Peregrini after a war; but this institution, then springing from the Jus Gentium, soon passed into the Jus Civile. As regards the Recuperatores, they were proposed by the Magistrate, but might be objected to by either party.

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branch of the inferior magistrates. They were erected into a permanent tribunal in the early days of Rome, in which character Quintilian speaks of them in opposition to the Judex Privatus. In the first stage of the existence of this Judicature their number was 105, three centumviri being furnished by each of the 35 tribes; though in later years that number was much increased. Divided into four Consilia or Senatus, they thus formed separate and distinct tribunals, the president of which was a Prætor[1]. The business that was transacted in these courts embraced everything relating to Quiritarian ownership, and all questions arising out of successions; a jurisdiction aptly marked by the spear suspended over their seats of office, "the symbol of Quiritarian ownership;" and in all the questions so brought before them, they decided on the law[2] as well

Inst. Orat. IV. 1. 57. ed Spald.

Festus, sub voce.

Cic. de Orat. I. 38.

Gaii, IV. 16.

[1] Some lawsuits were carried successively before two of these Consilia, others were heard before the whole four collectively, each one of which gave a separate judgment. Cf. Quintilian, V. 2, I. XI. 1. 78, XII. 5. 6. Plin. Ep. I. 18, IV. 24, VI. 33. D. 31. 2. 76.

[2] Hence the importance and influence of their Præjudicia. Val. Max. VII. 2. 3. 4. 5. Quint. Inst. Orat. V. 2.

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The Centumviri,

as the facts. We may judge of the great importance of this court, from the gravity of the matters administered there, and from the testimony borne thereto by Pliny and Quintilian. Before Cicero's time some of the most influential and renowned lawyers of the day had made these courts celebrated; it was there, too, that one of his most skilful speeches, that Pro Cæcina, was recited; and therefore I propose to point out in a few words the connexion between this branch of Roman judicial organisation and the others. And first, let us consider them as tribunals; in this light we see at once that the Centumvirs were the representatives of the sovereignty of the Roman people; the Judices, the Arbitri, and the Recuperators, being the representatives of individual interests, whether in Rome or the provinces, though connected with the higher magistracy as legally appointed delegates. Let us view them, secondly, with relation to their powers; and here we find, that all the questions, that affected a Roman in his status, or family, were referred to the province

considered as Public Officers;

as Judices.

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of the Centumvirs, while to the Judices and Arbitri belonged all Prætorian actions, all personal actions arising out of contracts, and all mixed and arbitrary actions. To the Recuperators were referred possessory rights, actions for excessive exactions, and "actiones utiles in factum." Each of these courts was distinct in itself, there was no appeal from one to the other; for, as I have said before, in civil matters there was no appeal at all: but here the courts of the Centumviri differed somewhat from the others, as I have above shewn.

The Judices Pedanei.

It remains for me now only to add a few remarks on the Judices Pedanei, in order to complete this chapter of the Roman magistrates, superior and inferior. Heineccius dismisses this class of officers very briefly, as being merely the friends of the Judex, lawyers by profession, who sat with him to aid him in the cause. Zimmern, however, has devoted a chapter to the careful analysis of their history, and the result he arrives at is, that they formed that body of municipal magistrates, termed

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Curiales, whose jurisdiction was less important than that of the magistrates properly so called. He contends that they took the name of Judices from the fact, that they themselves sat to hear causes, and had no right to remit the parties to another Judex; while the term Pedanei was applied to them, to shew that they had no tribunal of their own: whatever they were, this is clear from the Code and the Digest, that they had cognizance only of matters of an inferior nature to the other judges, and that therefore they occupied a very inferior position[1].

C. 3. 3.
D. 2. 7. 3. 1.

[1] In the following passages, D. 3. 1. 1. 6, D. 2. 7. 3. 1, we find that a Postulare was addressed to a Judex Pedaneus, as well as a Vocatio in Jus heard before one of them; this shews that they were not Judices dati.

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CHAPTER IV.

The various Divisions of the Actio.

Definition of the word Actio.

In several passages of the Digest we shall find considerable variation in the definition of the word Actio, as regards the limitation of its objects. Thus Papinian speaks of it exclusively with reference to a Persona; Ulpian states that it has a general and a special signification; in the first it refers to a Res as well as to a Persona, in the second to a Persona only: in other passages its sense is more enlarged, embracing that which is termed Persecutio[1], and opposed as well to the Præjudicia[2], as to the Interdicts, and Prætorian stipulations. To reconcile these apparent discrepancies, it should be remembered, that originally

D. 44. 7. 28.

D. 50. 16. 178. 2.

D. 44. 7. 37.

[1] Applied to personal and real actions. N. B. The word Realis never occurs in the sources, Personalis does.

[2] Or preliminary investigations of some doubtful point in a suit, in order to aid the Judex in the decision of the whole question.

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there was no other Action, but that In personam; that those In rem, or Petitiones, were introduced at a later period; and that for convenience' sake the two were both comprised in the single word Actio. To arrive at any clear, and precise notions of the distinction of actions into their separate kinds, we must be guided by the motives which have led to their classification; of these some refer to their essence, that is, the link which unites them with the rights they protect, whilst others regard the forms of procedure, of which I have already spoken; the first of these shews us their practical development, the second their historical.

Gaii Com. IV. 91. D. 44. 7. 25. D. 44. 2. 14. 2. I. IV. 6. 1. **Actio In Rem and In Personam.**

Now the primary division of Roman actions is, that which is given by Gaius, by Ulpian, by Paulus, and by Justinian, In Rem and In personam, the explanation of which is to be seen in the ancient and valuable text of a Jurisconsult much older than Justinian's time, but reproduced by him in the Institutes. From an examination of this text, contrasted with the words of Gaius and Ulpian, we obtain the following

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results; first, that this division is a general and universal one, embracing all actions whatever; secondly, that in it are contained two specific forms of the same genus, designated by Actio in Personam, or all those proceedings, that are remedies in the case of obligations, and Actio in Rem, or the remedies that protect every other right, not arising Ex Obligationibus.

Applying this general division to the different classes of rights, we shall find, that as only those legal remedies, which protect obligations, are comprised in the Actio in Personam, so the Actiones in Rem protect all the subjects related to the right of things (Jus in Rem), to the right of succession, and to the right of family, that is, to property, and the Jura in Re. Briefly summing up these remarks, it appears, that to the Jus in Rem corresponds the Actio in Rem; to the Jus in Personam, the Actio in Personam: but further, for the purpose of obtaining a clear analysis of the division we are engaged in, we may consider actions with reference to the individual against whom they are

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directed. Let it be remembered then, that in the Actio in Personam the defendant was determined, and known, *i.e.* the action was against A; while the Actio in Rem was brought against a defendant unascertained, and unknown, that is, against A or B, as the the case might be[1]. At the same time we shall find exceptions[2] to this rule, for in certain cases[3] personal actions were extended to undetermined defendants, actiones in rem[4] to determined ones. From this primary division the transition to the additional class of mixed actions is simple enough. In nearly all the Actiones in Rem there were two objects, the *principal* one, viz. the recovery of the Res, and the *subordinate* one, that of some additional demand arising out of it,

Mixed Actions.

[1] That is before the violation of the right, because the only person who can break the obligation is he who enters into it, whilst in the other case, as *any* person can cause the violation which produces the action, so before it can be ascertained who the defendant is, the violation must have been made.

[2] To this class of exceptive cases may be referred some of what are termed mixed actions; for which see further on.

[3] *E. g.* The Actio Aquæ Pluviæ, the Interdict Unde Vi, the Interdict Quod Legatum.

[4] The Hereditatis Petitio, Actio Pauliana, the Vindicatio Dotis.

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in the shape of indemnity, for consumption of the produce of the Res, or for the deterioration of the Res itself; yet still these actions remained actiones in rem: there were, however, three actions founded on obligations, and relating to partitioning rights and claims, D. 10. 1. 1. which, though properly termed personal, were remarkably distinguished from other personal actions, in this fact, that the question of property (which is the peculiar mark of Actiones in Rem) might be decided at one and the same time. In two of them, specially relating to partition, (the Familiæ herciscundæ and the Communi dividundo Actiones), the question of the plaintiff's title, if he was in possession of the thing, was bound up with that of the partition; while in the third (the Actio finium regundorum) the real object of the defendant was, as the words of the above law run, the Vindicatio Rei: hence Justinian says of this class of actions, "mixtam causam obtinere videntur tam in I. 4. 6. 20. rem, quam in personam[1]."

[1] The formula of adjudication peculiar to these actions may be seen in Gaius, IV. § 42.

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Actiones Stricti Juris.

I pass on now to another important division of Actions, the clear understanding of which is a key to certain kinds of action, mentioned in the Justinianean body of laws, the Actiones Stricti Juris, and Bonæ Fidei, the Condictiones and the Arbitrariæ Actiones. The words of Cicero in the Oration Pro Rosc. Com. at once point out the existence of two kinds of private suits, the Judicia and the Arbitria; and shew that in the first the strict letter of the law was required, in the second not only was it not insisted on, but principles of equity might be introduced,—a contrast preserved by him in the epithets Legitima and Honoraria, applied respectively to each of them[1]; and characterised still further by the men-

c. 5.

[1] On this part of the subject see a remarkable passage in Seneca de Beneficiis, III. 7: "Ideo melior videtur conditio causæ bonæ si ad judicem, quam si ad arbitrium mittatur, quia illum formula includit, et certos, quos non excedat, terminos ponit; hujus libera et nullis adstricta vinculis religio*, et detrahere aliquid potest et adjicere; ubi id, de quo sola sapientia decernit, in controversiam incidit, non potest ad hæc sumi Judex ex turba selectorum quem census in album et equestris hereditas misit."

* Discharge of "official duty," in which technical sense it is frequently used in the Roman Law. Cf. D. 22. 5. 13. D. 42. 1. 33. D. 48. 8. 11. C. 5. 71. 5.

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tion of the formula usually appended to them, either "ex fide bona" or "ut inter bonos bene agier" or "quid æquius melius." It is evident, then, that in his day two kinds or modes of proceeding had been established; in one, where the Jus Strictum was observed, the matter was decided by an individual selected out of the list of Judices; in the other, where Bona Fides and principles of equity were permitted, the dispute was settled by some individual, chosen indiscriminately out of the citizens, and called Arbiter: it will not, however, be out of place slightly to analyse the motives that led to such a distinction. I stated at the outset of these pages, that it is the business of the state to provide for the regulation of the proper enjoyment of every individual's rights, and that each possessor of rights in and to a thing looks for the protection of his property to the administrators of the laws. If the laws, as originally declared and administered, were wide enough and elastic enough to embrace all the mutual engagements of men, then, undoubtedly, the

Topica, XVII. De Off. III. 15. 17.

Actiones Bonæ Fidei.

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Strictum Jus alone would be the sufficient rule. But however simple at the outset may be the rules and regulations of a state or society, in process of time the questions at issue will not be confined to infractions of rights regarding property or possession, but a variety of collateral points must come in; among others the engagements or agreements that the individual enters into with another. These from their novelty and variety necessarily cannot be foreseen, so as to be provided for by the laws of a state, and much, if not all, of their observance must depend upon the principles of honour and honesty that influence the mass, until, from their bearing upon the business of every-day life, they become objects invested with a factitious importance; then they must in some way be provided for by the laws of the state, and, if no established court can take cognizance of them, either one must be established for the purpose, or fictions must be resorted to to bring them within the scope of the established courts. These mutual engagements, or undefended

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agreements, not judicial but moral, were watched with great care by the Roman jurisprudence; and, under the name of Bona Fides, received as much legal sanction as rights directly resulting from property. The protection of property rights, of course, was a simple and easy form by the aid of the Judex, and the Jus Civile, or common law; but in cases depending on the Bona Fides of one of the parties, each being of opinion that he had right on his side, and yet ready to admit that he might be deceived, the only course was to submit the dispute to the decision of an impartial third party, and to agree to abide by his judgment: the object of this third party or arbiter, thus chosen by their mutual consent, being to decide upon the merits of a case not depending on the Strictum Jus, he necessarily was able to look at it unconstrained by technicalities, and in any light which seemed just and equitable to him.

Hence, then, every strict right among the Romans, when infringed, was remedied by means of a Stricti Juris Actio, generally

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called Condictio, at the hands of a Judex; whilst the remedies for infringements of all other rights, administered by an Arbiter, were termed Bonæ Fidei Actiones. Of the Condictiones there were three classes, distinguished both by their formulæ and by some important practical rules. The first of these was called "certi condictio," or "si certum petetur," in which the object sought to be recovered was a fixed sum of money, and the formula ran, "si paret, centum dari oportere;" in the second, the object was to obtain the transfer of some indeterminate Res, not ready money, and here the formula ran "si paret, hominem Stichum dare oportere;" the third class was called Incerti Condictio, its object being the recovery of everything not included in the other two, but like the second, also uncertain, and its formula running in this way, "quidquid dari fieri oportet."

The Condictiones classified.

Intention of the Actiones Bonæ Fidei.

The Actiones Bonæ Fidei had no such distinctions as the above; their object was simply to obtain the fulfilment of such agreements as every honest man ought to

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be willing to execute, an object expressed in their formula, Quidquid dari fieri oportet ex fide bona. To sum up then briefly what has been above exhibited; the Actiones stricti juris were actions in the full proper sense of the word; the Actiones bonæ fidei were neither so definite, nor so rigorous; in other words, the former were the rule, the latter the exception. The distinctive sign of one and the other was the employment of Judex or Arbiter as the case might be, and therefore, when with the ancient Ordo Judiciorum the old distinction of Judex and Arbiter disappeared, the primitive system of actions was destroyed also.

Arbitrariæ actiones;

I now go on to explain what the Arbitrariæ actiones were; and if we were to take simply the text of the Institutes of Justinian on this subject, we might fairly conclude that they are only another expression for Bonæ fidei actiones. But in reality these Arbitrariæ actiones have this distinct character, that they were intended to be not so much positive and direct judgments to restore, or to pay in the

J. 4. 6. § 28—30.

their distinctive character.

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first instance, as friendly directions by the Arbiter how the defendant was to satisfy the claimant's demands; if this direction was disregarded or refused, then they became positive judgments. In other words, the Actio arbitraria was either an attempt to reconcile the parties, by an equitable opinion on the case, or else it was a regular process. The words of the text, to which I have above referred, point to this view, "permittitur Judici ex æquo et bono secundum cujusque rei naturam, æstimare quemadmodum actori satisfieri oporteat," a confirmation of which may be seen in the
D. 6. 1. 68. 68th law of the Digest de Rei Vindicatione, in which the Judicis arbitratus is clearly mentioned, in connexion with a general rule on the subject of the judgment to restore a thing. What then were the Actiones arbitrariæ thus characterised? They were actions not tied down by the "Strictum Jus," but capable of receiving such modification as the Arbiter pleased; therefore they did not include the condictiones, or the Actiones civiles ex delicto, whilst they did

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include those bonæ fidei, in rem, and prætoriæ. The modification of which they were susceptible, by means of the arbitraria formula, might lead one to suppose that they embraced all unrestricted actions whatever; but such was not the case, for though every Arbitraria actio was an arbitrium, every arbitrium was not an Arbitraria actio[1]. This special form of procedure applied to all equitable actions, where the object was the restitution or production of a Res, and to none others. By way of summary, then, we may classify the Actiones arbitrariæ thus: First, the Actio in rem having a formula petitoria in the Intentio; secondly, Interdicts exhibitory and restitutory, where no recourse was had to proceedings by way of sponsio; thirdly, the action "de eo quod certo loco;" and, fourthly, Personal actions in factum, to which the Formula arbitraria could be applied.

Classification of the act. arbitr.

D. 13. 4.

[1] Therefore, in Gaius, IV. 141 and 163—165, be careful not to confound arbitrium with the arbitraria formula in every class of actions, but confine his words to interdicts of which he is there speaking.

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CHAPTER V.

A Sketch of Roman Proceedings at Law.

In this part of my labour I shall consider the time and place of commencing civil proceedings before I speak of the mode of carrying on suits. In the early period of Roman history we know that there were certain days marked out for the administration of justice, (every ninth day) called nundinæ[1], a regulation introduced by the Lex Hortensia for the special benefit of the country folks coming to market: these days, thus devoted to legal business, were afterwards increased, until in the reign of Marcus Aurelius they numbered 230. Under the emperors, we read of sittings termed "rerum actus," held in the winter and summer-months at Rome. In the pro-

Days for holding courts.

Cf. Macrob. Sat. 1. 16. Dion Hal. VII. 58.

Suet. Claud. 20. and Oct. 32. Gaius, II. 279.

[1] The technical term for non-judicial days was Dies feriati.—D. 2, 12, 2, and 6.

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vinces these periodical sittings or sessions were fixed at their "conventus" by the Magistrates who presided in the province with the full Jurisdictio[1]. On the introduction of Christianity, every day but Sunday was a court-day, with the exception of certain holidays (religious and civil). The Magistrate had the power of fixing the number of and the days for these sessions, and it was his duty to frame regulations for that purpose. If in these sittings the business was conducted before the Magistrate seated in his chair of office, it was then said to be done pro tribunali, and those cases in which a Causæ Cognitio or previous investigation was required, could only be so settled. If the business was unimportant enough to be settled summarily the proceedings were heard de plano, and the judgment was affixed to the foot of the libellus.

Cf. Cod. Theod. de Feriis, 19. 21. 22. 24.

D. 37. 1. 3. 8. Frag. Vatic. 156. 161. 163. 165.

D. 1. 16. 9. 1.

[1] "Æstivos menses," says Cicero ad Att. v. 14, "rei militari dare, hibernos jurisdictioni:" in the Republican times these itinerant sessions (conventus) were very frequent, but the word conventus was also used to signify not only the sessions but the towns where they were held.—Cf. Cic. Verr. v. 11.

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Place for holding courts.

The Comitium or the Forum was the proper place for hearing suits, even from the time of the Decemviral code, where the rule is thus laid down: "ni Pagunt in comitio aut in foro, ante meridiem causam conjicito." There the superior Magistrates took their seats on their curule chairs, while the Judices and the other inferior Magistrates appeared on their subsellia.

Changes made in the Imperial times.

In the period of Roman vigour, when arms and eloquence made her name renowned over the world, and the voice of a Cicero was heard in the Forum enlarging on the deeds of a Scipio, these public courts were crowded to listen to the wit combats of the great lawyers; but when her old glory was fallen, and nothing of her greatness was left but the name, such open pleadings were put down, and instead of the Forum, suits were heard in the Basilica, or even in less frequented spots, the Auditoria and the Secretaria; a change detrimental alike to liberty and eloquence. "Alas," says Tacitus, "how much injury have these Auditoria and Secretaria, where now nearly all suits are

Dial. de Caus. Corr. Eloq.

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heard, done the eloquence of our bar." What was still worse, or rather what was a direct consequence of substituting comparative secrecy for openness, the Magistrates' tribunal being often concealed from the rest of the court by a curtain, and persons of rank having the privilege of free communication with the curule chair, bribery and corruption of so open and barefaced a kind were practised, as to provoke an indignant remonstrance from the Emperor Constantine.

The Proceedings in court.

In a former part of this work I alluded to the method of commencing proceedings, in the rude æra of the Republic, by a summons[1], on the plaintiff's part, of the defend-

[1] The distinction between the Actio in Rem and in Personam at this period was marked by the special form of commencement peculiar to each. Every "in Rem actio" began by the symbolical act of the "manum consertum," the explanation of which is told by Aulus Gellius (20, 10) in an amusing account of his posing a "grammaticum celebri hominem fama," by asking him what the expression meant. On his stating, that it was not his business "clienti promere jura," as he was a grammaticus not a consultus, and better versed in poetry than in law, Gellius cited Ennius where he had met with it. The grammaticus confessing himself beaten, a friend of Gellius explained the phrase "man. cons." to mean that in any suit involving the right to possess a Res in being and in sight or at hand, (whether an ager

Manum conserere.

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ant, and by an opportunity given this latter personage of avoiding violence by a vadimonium and by offering pledges or bail to appear, called Vindex[1]. This principle of casting on the plaintiff the business of summoning a defendant continued in vogue for a long time, as may be seen from a statement of Gellius, that in a difficulty as to the plaintiff's power to summon a Quæstor before the Prætor, he shewed from Varro that it was allowable, and accordingly it was done.

D. 2. 4. 22. 1.

Lib. 13. c. 13.

Gaius, IV. 46. 183.

This power of summoning a defendant so granted to a plaintiff, received several modifications and changes in the course of time: thus certain personages were specially privileged; at certain seasons of the year a summons could not be taken out; every man's house too was privileged against a summons, until eventually all violence

Alterations in the law of summons.

D. 2. 4. 2.
D. 2. 12. 1.

D. 2. 4. 18.

or anything else,) it was the custom for the parties holding one another's hands to make their claim before the magistrate in proper form. The man. cons. was then followed by the Judicis Postulatio, whereas the In personam actio commenced at once with the Judicis postulatio.

[1] "Ab eo dictus quod vindicat, quominus, is qui prensus est teneantur."—Festus.

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in the matter was forbidden, and by an edict it was enacted, that the giving simple ordinary caution, or a fidejussor, should be substituted for the vindex, and then the whole form of proceeding was changed. Instead of the In jus vocatio, or summons taken out by the plaintiff before the Prætor, the parties entered into a special agreement[1] (called in the Digest Stipulatio in judicio sistendi causa facta, and satisdatio) to appear on a given day In judicio; when, if the defendant did not make his appearance, the Prætor gave judgment by decreeing a Missio in possessionem bonorum ejus to the other party[2]. Gaius, 4.

In causes tried pro Tribunali at Rome the parties appeared and were heard immediately if it was possible, but business was not so expeditiously performed in the provinces; there all the causes were put down Mode of proceeding in the Provinces.

[1] Cf. Cicero Pro Tullio, 20, where this agreement is termed Vadimonium.

[2] Two passages in the Digest illustrate this, and are also remarkable as describing the defendant's offence of keeping out of the way by the very word that has been appropriated by our law—latitat, "Qui fraudationis causa latitabit," &c., D. 2, 4, 17, and D. 42, 4, 7, 1.

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Cic. in Verr. ii. 2. 15. in a list without order and called on indiscriminately, whenever the day of hearing causes, which was decided by lot, was settled; hence the "gratia fallacis Prætoris vicerit urnam" of the Poet. In the days of the Legis Actiones suits were tried conformably to the formalities of one of those actiones, but under the Formulary Process the business commenced by a statement of the plaintiff's claim delivered by him to the defendant, termed Editio actionis. The special formula then followed. If there happened to be one in the Prætor's edict, that was perfectly adapted to the point in dispute, it was easy to draw up all the pleadings. The above passage of the Digest is in singular analogy with the principles of our law of pleading, the reason for the editio actionis being stated to be, that the defendant might know what formula (or form of action) was adopted, so as to enable him to plead thereto with certainty. But if a previous inquiry (causæ cognitio) was necessary in order to ascertain what particular formula was required, or if the point

D. 2. 13. 1.

Proceedings under the Formulary Process.

D. 14. 5. 2. 42. 8. 10.

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in dispute was one not already provided for by the Edict, then the point was argued before the Prætor, and if he was not satisfied with the plaintiff's statement, or thought there was no real ground of action, he could refuse to allow the case to proceed further. If there were several forms applicable to the same subject, the plaintiff could choose which he liked, and until the Litis contestatio was completed he might alter the formula or amend it in any way he pleased, but after the Litis contestatio no alteration was permitted.

Power of amendment.

Gaius tells us how important it was to the plaintiff to prepare the formula accurately, and in the "Topica" Cicero points out the necessity of a lawyer being skilled in this branch of the technicalities of his profession[1].

Gaius, IV. 57. Importance of the formula.

Cicero, Top. c. 17.

To the plaintiff's statement or declaration succeeded the defendant's answer, by exceptio, in which he made his statement, or recital of his plea in answer, for the

[1] In the ch. 28 of the "De Orator. Partitione" Cicero gives a very clear explanation of the technicalities of the Formulary Process.

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purpose of having it introduced into the Formula. All these proceedings were oral, though there are proofs in the Vatican Fragments, and in some passages of the Digest, that the plaintiff's statement, the defendant's plea, and the Magistrate's interlocutory judgment, were sometimes drawn up in the form of written pleadings.

Proceedings in Jure.

These preliminaries were matters cognizable only "in Jure" and before the Prætor, who then remitted them with the Formula to the Judex named by him, and thus threw them "in Judicio" into the form termed the "Litis Contestatio[1]," which closed the technical proceedings. On the third day, "dies comperendinus," the parties were bound to appear before the Judex, who employed the interim in considering the evidence, or in taking the opinion of others on the merits of the case[2].

[1] So named, says Festus, because it was an ancient Roman custom for the plaintiff to call on some of the bystanders to be witnesses at it, *i.e.* antestari sc. contestari.

[2] A chapter in Aul. Gellius, xiv. 42, gives an amusing description of the difficulties he had in making up his mind on the merits of a case when sitting as Judex, and of his employing the intermediate days in taking advice of others how he ought to decide.

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Probably it was at this time that the bail spoken of in a law of the XII. Tables (Vades Subvades) was given[1]. This kind of bail however ceased with the Legis Actiones, except in one or two particular cases, such as those mentioned by Gaius. Com. IV. 88. 90. 96. 102.

When these preliminaries "in Jure" were adjusted, the suit was heard by a Judex, and became one "in Judicio." Then the first step was a brief statement of the matter in dispute, called the "causæ conjectio," or "causæ collectio," followed by a more detailed narrative of the facts. The evidence was introduced, not in any special form, or at any particular time, but in such mode as suited each party[2]. Quintilian tells us that the selection and rejection of evidence was a business by which the skill of a Patronus was much tested. It was allowable either to produce the witnesses and interrogate them in Court, or put in their evidence by

Proceedings in Judicio. Gell. v. 10. Gaius, IV. 15. Quint. Inst. Orat. v. 7.

[1] See in Varro de Ling. Lat. v. 7, the distinction between Sponsor, Vas and Præs; Gellius, XVI. 10, mentions the Vades and the Subvades as antiquated terms in his day.

[2] For proof of this, cf. Cic. Pro Rosc. Com. 14, and Pro Quintio, 18 and 19, where the speeches of the advocate are interrupted to introduce his evidence.

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way of depositions taken on oath[1]. But besides the direct and positive testimony of witnesses, other evidence was allowable, such as "documents," "common report," or "reputation;" and, in certain cases, such as *e.g.* questions relative to property[2] depending on a testamentary succession, answers extracted from slaves by torture. The Judex had full power to cause an oath to be administered to a witness where he deemed such a step necessary to complete a proof that without it was doubtful; and, from a passage in the Digest, it would appear that one of the parties might direct the Judex to cause an oath to be administered to his adversary. When the regular pleadings were over, each party could recapitulate the principal points in his case, pressing his opponent with questions and counterquestions, after which

D. 22. 3. 25. 3.

[1] Cic. Pro Rosc. Com. 14 and 15, and D. 22. 5. 3. 4, and Quint. v. 7. § 1 and 5. The permission to give evidence by depositions in civil suits was accorded by Justinian, C. 4. 20. 16 and 17.

[2] Paulus in his Sent. v. 15. § 6, says, "In re pecuniaria tormenta nisi cum de rebus hæreditariis quæritur non adhibentur."

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judgment was given[1]. If, however, the Judex thought the matters in dispute had not been properly and clearly laid before him in the pleadings, he could adjourn the case (lis ampliata) for a second or third hearing; hence Cicero's expressions prima, secunda and tertia actio. If the defendant failed to appear when the case was called on, he was summoned three times, sometimes orally (denunciatione), sometimes by writing (literis), and sometimes by a public notice (edictis); after which he suffered judgment by default[2].

Adjournment of case.

Pro Flacco, 20.
Pro Cæcina, 31.

[1] This, though generally a written one, was sometimes delivered *viva voce*. When written, after it had been read out it was inscribed on the tabella. Suet.—Claud. 15.

[2] Paul Sentent. v. 5 a. § 7.

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CHAPTER VI.

The Alterations introduced by the Emperors.

MANY notable changes were made in course of time in the administration of justice, by which the position of the chief Magistrate became gradually much affected; for though the Consuls still retained something more than the mere shadow of a name, and the position of the Prætors was not very materially altered for some time, other officers had sprung up entrusted with a portion of the duties, that till then had belonged almost exclusively to the above-named dignitaries. Among these new officers, the Præfectus Urbis in Rome, and the Magistratus Municipalis in Italy and in the provinces, had certain duties, and a certain share of the Jurisdictio entrusted to them. The Præfectus Urbis was a Magistrate of considerable importance, sitting not only as a criminal Judge within the jurisdiction of

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the city, but presiding also in a court where certain matters were heard, some of which we should call misdemeanours, but which in the Roman jurisprudence were termed civil offences[1]. From jealousy of the municipal towns the emperors had constantly reduced their privileges, among other reductions taking away from the Magistratus Municipalis as well cognizance in criminal proceedings, as in all matters the hearing of which depended upon the officer possessing the Imperium, limiting therefore the Municipalis Magistratus to the exercise of the Jurisdictio alone. But the most remarkable and noteworthy change was the elevation of the Emperor into the position of supreme Judge over every other officer, with power not only to decide on all matters brought before him, but to examine them either himself, or by any delegate he pleased, whether the Senate, some magistrate, or a private individual

The municipal towns stripped of their privileges.

Suet. Claud. 14. 15. Suet. Nero, 15. D. 49. 3. 3.

[1] See them set out in D. 1. 12. Among other things it is stated that permission was granted them to hear interdicts Quod vi aut clam, and Unde vi.

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occupying for the nonce the position of a Judex.

Innovations on the old mode of proceeding.

Although in general the old mode of proceeding was observed as well at Rome in the courts of the Prætor and Præfectus urbis, as out of Rome in those of the Præsides and the Legati, viz. to open the business In jure and obtain a Judex, and so go on with it In judicio, still there were not infrequent innovations on this plan,—innovations introduced at the command of the emperors, with the object of shortening suits. These changes at first were confined to the proceedings heard by a Judex[1] named by the Emperor, but in a very short time were extended to the other courts.

Distinction between ordinary procedure and Extraordinariæ Cognitiones.

Hence began the distinction between the old forms or the ordinary procedure and the new or extraordinary Cognitiones, and it soon became a recognised rule that every

[1] So much was rapidity and despatch aimed at in these changes, that very often the Emperor only gave a Judex on condition that the parties should not appeal from his sentence; for by this time the power of appeal had been fully established.—D. 49. 1. 4.

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cause should be taken as an Extraordinaria cognitio, when the principle involved in the plaintiff's statement was not recognised by the civil law or the Prætor's edict, and therefore had to be referred to the Emperor. The proper mode of proceeding then was for the magistrate to introduce the suit, not in the regular form as magistrate, but Extra ordinem as a delegated officer.

These innovations must have been much approved, for ere long they soon spread, and became so important that a title of the Digest is devoted to their consideration, in which they are classified and arranged. What added to their value was the fact that they were disposed of at once without waiting for the regular Conventus[1], and unhampered by formulæ, or the necessity of naming a Judex. And soon what had been only an exceptional case, viz. that the direct decision of a Magistratus might in certain questions take the place of a reference to a Judex, became a general rule in

D. 1. 13.

[1] A sort of perpetual "sittings after term."

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Diocletian's reign, as better suited to a government careless of old notions, and to a people immersed in business and therefore impatient of delay in civil procedure.

Forms of action destroyed.

Hence all forms of action were swept away; there was no need of any formal summons being sued out on the plaintiff's part; the Prætor, if he pleased, could at once call on the parties to state the case, and decide it then and there, whilst not only the Prætor but all the other Judices and officers could hear and settle suits in the same free, unformal and rapid manner. The destruction of the Vadimonium took place in the reign of Marcus Aurelius, by the introduction of another form of summons, a simple Denunciatio Litis; but as this was, in its turn, considered to be too much productive of delay, in several actions permission was granted to omit it, and therefore before Justinian's time no more was heard of it in practice.

C. Th. II. 4. 2.

I shall now briefly state the mode in which a suit was tried under this new and more summary process; considering first the

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business before it came into court, and next the proceedings at the trial[1].

Actions under the Summary process.

To commence a suit then, in a legal form, the plaintiff was required to prepare a short statement, signed by himself, of his cause of action, termed Libellus; this the magistrate directed an officer of the court (viator, executor) to serve on the defendant, with the addition of a summons either verbal or written. A period of twenty days was then allowed to elapse, before the defendant was bound to give in a written acknowledgment of the receipt of the summons, and a statement that he intended as well to defend the action as to be ready to appear; when he had either to give bail for his appearance at the proper time, or to take an oath or even make promise to the same effect: but if he gave bail, it was only for appearance, and, unlike the

[1] If the defendant kept out of the way to avoid a summons he was then called on three times, after which, on his non-appearance, or supposing he had given bail, on his refusing to go on, the suit was conducted without him, and if judgment went against him the plaintiff was put into possession of his goods, or of the object sought to be recovered if the action was in rem.

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old form, no pledges were required for the payment of damages. If he could not give proper bail, and the necessity of such a step were insisted on, the viator was held to be responsible for his attendance under a penalty.

When all these steps were taken the cause was ready for hearing. On the appointed day the plaintiff stated his case at full length. If the defendant acknowledged that the plaintiff's demand was properly made, that was held equivalent to the old Confessio in Jure. But if he denied the justice of it, that was considered to be a sufficient issue, and the issue so joined was termed Litis Contestatio, having all the effects of the old form; then came Exceptiones, Replicationes, Duplicationes[1], &c., but no formula was necessary for their introduction, one consequence of which was, that no fatal objection could be made to any Exceptio on the ground of its being Dilatoria. All the pleadings were taken down in writing by certain officers appointed

Litis Contestatio.

Lydus de Mag. III. 20. 27.

[1] Pleas, Replication, Rebutter.

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for the purpose, named Epistolares and Officiales. The magistrate, or Judex, allowed the pleadings to extend to any length he deemed necessary to explain the point in dispute. One part of the business belonging to the Officiales was to assign to the parties the witnesses whom they thought to be proper ones, and these were sworn before their evidence was received. They were examined in the presence of the parties to the suit, and their examinations having been reduced into writing were delivered to the parties[1]. When documents were offered in evidence, great care was taken to establish their genuineness. The Judge was bound to give a written decision, which was read in the rough draft (Periculo), after which it was entered in a Register of Judgments, where the Judge added his signature, and then a copy of it, together with the whole

C. Th. II. 18. 1.

The Officiales, their duties. C. 4. 20. 9.

The judgment how given.

[1] See C. 4. 21. 16 and 20, N. 49. 2, N. 73, on the subject of documentary evidence, which, as written instruments were now much resorted to, became a very important part of evidence; in order to obtain correctness, the preparation of these deeds and instruments was entrusted to Tabelliones having offices (stationes) in the different towns situated in public thoroughfares.—Nov. 44.

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Lydus de Mag. III. 11.

pleadings, was delivered to the parties. In difficult questions, the Judge sent the case to the Emperor for his decision, together with a written statement of the whole transaction, as well as his recommendation to the parties, and their own opinions. The decision so referred to the Emperor was by his orders laid before a commission composed of the Quæstor of the palace and two other "personæ illustres."

C. Th. XI. 29; XI. 30. Symm. Epist. II. 30; X. 39. 50.

C. 7. 62. 34.

Libellus Supplicationis.

Still another change took place in the history of these proceedings I am chronicling; by which permission was granted to a party to open his complaint to the Emperor himself by a Libellus Supplicationis, the effect of which was to put the matter on the same footing with a Litis Contestatio. The usual course was then for the Emperor to transmit the plaintiff to a Judex by a rescript drawn up by the Quæstor, and signed by himself[1]. This rescript and the Libellus had then to be carried before the Judex, and hence a new technical form was introduced into Legal

Editio rescripti.

[1] These Relationes were abolished by Justinian.—Nov. 125.

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Procedure, that of Editio rescripti, possessing no advantage over the others.

Such then were the changes introduced into Plaints or Actions at Law; and if rapidity was gained by the later forms, honesty and the "incorrupta fides" of the old Romans were lost. The magistrate was a creature of the Emperor, or of his favourites; the courts of justice were private places openly insulted by the presence of rich bribers; and the ancient unpaid Judices[1], who decided as Roman citizens for the welfare and honour of the city, were succeeded by a band of rapacious officers demanding and receiving Sportulæ, at first under the specious cover of fees for the registration of the pleadings and judgments, and for issuing summonses, but in process of time with the ostensible view of enriching

The evils of these last changes.

[1] Of the low condition and utter inefficiency of the Judices, Macrobius gives an example in the Saturn. ii. xii. as exhibited in a speech of C. Titius in advocating the Lex Fannia, who describes the Judex of his day as a drunken, gluttonous knave, whose only desire was to avoid all work, and who, when forced, "ad comitium vadere, ne litem suam faciat," was often so overcome with wine as scarcely to be able to raise his head up or keep his eyes open.

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themselves at the expense of the parties. Long before the fall of the empire justice was an empty name, and the courts, in which it was supposed to preside, became the resort of all who strove to seize the wealth of others, by the corruption that was there openly permitted—

Heu Pietas! heu prisca fides!

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CHAPTER VII.

Roman Law of Evidence.

An account of the mode of Civil Procedure among the Romans would scarcely be complete without a slight sketch of two very important parts of all suits or actions at law, viz. the proofs, or the means by which the facts asserted on one side or the other are to be legally established; and the Right of Appeal, or that power which, in every complete system of law, is given to a dissatisfied suitor, to have the cause of his dissatisfaction with a decision investigated by a higher authority. I propose, therefore, in this chapter, to consider the manner in which proofs were introduced in the trial of a Roman action at law; and to throw into a brief narrative the principal rules by which the examination of witnesses was conducted, and the validity of documentary evidence was established.

Sources of the Law of Evidence.

The sources of the Roman Law of Evidence, it must be acknowledged, are the

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least satisfactory portion of that great mass of common sense and valuable legal information, the Corpus Juris Civilis, not so much on account of their meagreness, and certainly not because of the inferiority of the rules of evidence contained therein, in plain practical wisdom, to any other portion of their law, as by reason of the difficulty of collecting them out of the various pages of the Digest, Code and Novels in which they lie scattered. Ostensibly, five titles of these works are devoted to the subject of proofs, the 3rd, 4th and 5th titles of the 22nd Book of the Digest; the 19th title of the 5th Book of the Code, and a portion of the 90th Novel. But a diligent investigation of these titles in the pages of one of those old and valuable commentators, Gothofred or Cujas, to whom the painful labour of illustrating by parallel passages was a labour of love, will bring to light a multitude of references which, if collected, would form a respectable Treatise on Evidence. A careful perusal too of the Roman maxims on this subject will impress on the

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reader the conviction that the intention of the Roman lawyers was to facilitate to the utmost the admission of evidence, rather than to attempt in any way, by too narrowly sifting it, to favour its exclusion.

Evidence when taken.

It was not till the preliminaries had been settled In jure, and the Litis Contestatio was completed, that the evidence in the case was produced; this was done always before the Judex, to whom alone could be referred the question of its admissibility, and who, far from being tied down by any narrowing rules or formulæ, had full discretion given him to judge of the credibility due to each witness, and to estimate the value of the evidence laid before him. D. 22. 5. 3. 4.

Never given to the Judex in this part of a Cause.

The matter then in dispute being resolved into such an issue as could be laid before the Judex, it was necessary for the parties to the cause to convince him of the truth of the facts stated by them. How important and trustworthy the office of the Judex in its best days in the conduct of the cause was, may be judged of from that freedom of action which he possessed.

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C. 4. 20. 19. Thus it was the business of these officers to see that the witnesses were forthcoming at the proper time to give their evidence, and that one or other of the parties was then
C. 4. 20. 14. present in court; it was their duty to take down the evidence in their secretum or court; to judge of the merits of the persons so produced, and to decide whether they came within the class of legal witnesses; to issue the writs of summons themselves; to see that all the regulations in force were ob-
D. 22. 5. 3. § 6. served, which forbad the summoning of persons from a long distance, and from one Civitas to another, unless the custom of the province permitted it; and to inflict punishment on those who gave false testimony.

The subject I am now handling may be considered under three heads: first, the question of the Onus probandi, *i. e.* on whom, according to the Roman law, the burden of proof was cast; secondly, the different kinds of evidence in use at Rome; and, thirdly, who might be witnesses, and how many were required.

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First, then, as regards the burden of proof: the general rule of the Roman Law, not peculiar to the classical Jurisconsults and the imperial code, but in vogue even in the early Formulary era, was that the Onus probandi lay on him who made an assertion or allegation, not on him who denied one; a rule which has been extended to the Jurisprudence of our own days, and from which, maintaining as it does in general terms, that the demandant of a thing or right is bound to establish the reasons of his demand, the deduction may be drawn that the failure of him on whom the onus is thus cast to establish his reasons, is equivalent to a failure of his cause of action itself. The theory of such a principle springing from a Jurisprudence which has thus settled its *general* application in a regular formula admits, of course, of variation, in so far as its *particular* application is concerned; and in the Roman law this Onus probandi was not put forward as an absolute condition precedent tied down by any strict or rigorous forms: the plaintiff first introduced

Onus Probandi.

D. 5. 1. 62. D. 40. 12. 7. § 5.

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all the facts that were necessary to support his claim, or that could in his judgment weaken his adversary's means of defence, who immediately made his attack upon this statement, to which the plaintiff replied, and so they went on till the Judex thought that a sufficient issue was raised. By pressing his adversary in this way, under the expectation that the Judex would refuse any more dilatory pleadings, the plaintiff might at last cause him to lose his right of producing proofs; and when these oral pleadings were thus brought to a stop by the Judex, then the matter rested with him to decide on whom should be cast the burden of proof.

Fourfold division of the rules of the subject of the Onus Probandi.

The rules of the Roman Law on the subject of the Onus probandi may be conveniently classified under the four following heads: first, as a general principle, the burden of proof lay on him who affirmed, not on him who denied, a rule that was applicable to both parties, for if, e. g. the question in a suit involving the right of succession to property was, whether A. B.

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belonged to such or such a Familia, the burden of proof was cast upon him who asserted the fact, no matter whether plaintiff or defendant; so too where infancy was pleaded as a defence to an action, the Onus probandi here was on the defendant, whilst on the other hand, if the condition of infancy was a ground of action, and as such asserted by the plaintiff, it was his duty to prove this assertion. On this subject there is no lack of authorities in the Digest and Code; the three following examples, however, will illustrate the extent of the rule better than any other. In an action Pecuniæ numeratæ (or of money lent by way of Mutuum), as the plaintiff set up a debt as his cause of action, it was for him to prove its existence; but if the defendant pleaded payment, then the Onus probandi was cast upon him. Again, in an action to obtain possession, whether of lands or goods, the Onus probandi, as to the title, was upon him who laid claim to the goods, and the possessor of the things claimed was not bound to shew, in the first instance, that they were

C. 4. 19. 9.

Illustrations of this rule as to the Onus probandi.

C. 4. 19. 1.

C. 4. 19. 2.

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C. 4. 21. 5. C. 4. 21. 13. his[1]. So too, in any action, in which one of the parties asserted an accidental loss of documents, necessary to the case, he was bound to prove the fact of the loss, and of its being accidental. The second of these rules on the subject of the Onus probandi is, that generally the burden of proof was cast upon the plaintiff, assuming that he asserted his right to a thing, or advanced some claim; but not so, if he commenced the suit by a denial, whether express, or implied of another's rights, for "per rerum naturam, factum negantis probatio nulla est[2]." The third rule,

Second rule.

C. 4. 19. 23.

[1] See Roscoe on Evidence, 7th edition, pp. 434, 435.

Proof in Actiones negatoriæ.

[2] The question of proof in the Actiones negatoriæ is involved in considerable difficulty. Some writers maintain that where a proprietor refused to recognise the service or easement claimed, the proof of its actual existence was cast on the opposite party (the claimant), on the ground that, as property in the soil is a free gift in the hands of God, he who seeks to interfere with another's rights by such a dismemberment as that of a service, ought in fairness to prove the possession of the right. The text of the Roman Law, however, by no means supports this view. Theophilus, in his Paraphrase, explains the Actio negatoria to be really an Actio confessoria, that is, one in which an assertion is put forward, that the property has never been burdened with a service,—in confirmation of which, a passage from the Digest (39. 1. 15) may be cited, where Africanus the lawyer puts the case of a man who, claiming the right Altius tollendi, commences an Actio confessoria to establish the claim, to which the

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which is simply a consequence of the limitation of the first, is, that whereas by some Exceptiones (pleas) the defendant became as it were plaintiff, he was compelled to prove his Exceptio; as, *e.g.* if he pleaded an agreement, or payment. The fourth is, that where the plaintiff and defendant merely made contradictory assertions, then the Onus probandi lay on the plaintiff; as when a legatee sought to recover from the heir a legacy, which the latter asserted had been lent, or given to another person by the testator in his lifetime, the fact of such loan or conveyance by the testator would have to be proved by the plaintiff (the legatee). I go on now to the second of the three divisions, into which, for convenience' sake, I have arranged the matter of this Chapter,—the different kinds of legal evidence which were

Third rule.

D. 22. 3. 19. 3. Fourth rule.

The second division—the different kinds of Legal Evidence.

defendant enters no appearance. The claimant then becomes a Quasi possessor juris; and to prevent him from carrying out his intention Altius tollendi, the owner of the property about to be invaded must, as a punishment for his laches in not pleading to the first action, commence an Actio negatoria, to oppose the attempt and "jure suo probare necesse habet;" that is, the burden of proof is cast upon him, although he is the plaintiff in a negatory action.—See Fresquet, Traité du droit Romain, T. II. p. 378.

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permitted in Rome. Strictly speaking proofs were made up of oral and written testimony —the evidence of witnesses and the evidence of documents—but there was another set of means by which the existence of facts might be inferred, viz. Presumptions; these had great weight with the Roman lawyers, by whom they have been carefully analysed and distinguished. It is unnecessary to do more than glance at the leading features of this branch of their law of evidence, and, in pointing out the threefold distinction of presumptions, viz. Juris et de Jure[1], Juris tantum[2], and Facti[3], I shall dwell only upon the Presumptiones juris; for the Presumptiones facti may be summarily dismissed, inasmuch as no positive rules were laid down by the Roman lawyers for their admission or application: the weight that was to be attached to them was left entirely to the Judex, on

Presumptive Evidence.

[1] Irrebuttable and conclusive; *i.e.* inferences made by the law of so high a nature, as not to be overturned by any contrary proof, however strong.

[2] Rebuttable and inconclusive; *i. e.* intendments made by law, holding good until disproved.

[3] Quite inconclusive of themselves, and depending for any degree of credit that may attach to them on corroborative facts.

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whose logical acumen and practical sagacity depended the effect they might have in the case. But, as the subject of the Presumptiones juris has been discussed at some length in the third Title of the 22nd Book of the Digest, one or two illustrations of the mode in which they were applied will explain the effect they produced. In the first place, they were rebuttable only by clear proof of some fact, or act, directly at variance with them; where, therefore, an individual did any act, which the law permitted to be done, the legal presumption was, that he had a right to do it, and his opponent was not allowed merely to assert the existence of some law or constitution restraining him from the act, but was put to strict proof of the law and its consequences ere the Presumptio could be rebutted. So too, as it was a Presumptio juris, that every act was legally done, until the contrary was proved, where an attempt was made to avoid a will, on the ground of its being informally drawn up, the opponent was bound to make strict proof of all its defects. Again, on the

Presumptiones juris.

D. 22. 3. 5.

C. 4. 19. 11.

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Presumptio juris that he who did an act intended to take on himself all the legal consequences of the act, where an individual entered into any agreement, or contract (without limiting its purport), the contract
D. 22. 3. 9. was presumed to be a *real* not a *personal* one, and was held to be binding on the heirs. So also, where a creditor gave a cancelled chirograph to his debtor, he was presumed to have discharged the debt also, in the absence of proof of his expressed intention to the contrary. In the second place, when these presumptions were not rebutted by contrary evidence, then "pro veritate habebantur," they were held to be intendments made by the law, and as such were admitted to be good and complete evidence in every cause.

I need not, however, dwell at any further length on this topic, because I have no intention to make a treatise upon the law of evidence; and because the subject of presumptions has been discussed so logically and so ably by Mr Best, in his admirable work on the Law of Evidence, that it will

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be sufficient for me to refer my readers to that book. Best on the Law of Evidence, 2nd edit. pp. 365 388.

I pass on then to the more direct proofs resorted to before a Judex, and commence with the subject of documentary evidence, of which there were two kinds, public and private, differing materially, with respect to the authority and weight attaching to them. Documentary evidence.

The former class may be considered under two heads: the first embracing those that were in their very nature public, as public registers, public monuments, the registers of the census, &c.; the second comprising such as were not *ipso facto* public, but became so by the operation of the Law, or confirmation of some proper authority, as, for instance, the documents specified in a passage of the Code, which, although really of a private nature, are there placed by the Emperor on the footing of public documents, and, as such, admitted as evidence in certain forms of action, where, if private, they would have been excluded[1]. Public. D. 22. 3. 10. C. 8. 18. 11.

[1] Instruments drawn up by a Tabellio were quasi public; but to make them good evidence they required certain formalities.—Nov. 47, c. 1.

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Private. To the class of private documents every other writing was referred, such as chirographs, receipts, acceptances, letters, household notes, accounts, &c. The value and authority of each of these two classes, as I stated above, differed widely in the Roman Law of Evidence. For public documents were considered of so high a nature, that not only did they prove themselves[1], but greater weight was attached to them than was given to any other species of evidence, whether oral or written. On the other hand, private instruments were never admissible, if they were not properly subscribed and witnessed, *i. e.* by three witnesses, unless the party, against whom they were produced, acknowledged the document to be in his handwriting; whilst all mere written declarations of third parties, informal documents, or private assertions, were summarily rejected, a full discretion however being left to the Judex to decide upon the reception of the documents offered in

Public prove themselves;

D. 22. 3. 10.

not so private.

[1] Of course due care was taken by the Judex to satisfy himself that they were produced from the proper custody.

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evidence, and to attach what value he pleased to them when received. The old ante-Justinianean regulations had permitted the comparison of the document produced in court, with that of other writings acknowledged to be the parties', for the purpose of proving the handwriting; but that custom was removed by special authority in Justinian's reign, on the ground of the opportunity it gave for fraud, and no comparison of handwriting was allowed, save in the case of documents witnessed in the proper legal form.

Comparison of handwriting.

C. 4. 21. 20.

The rules of the Roman Law, on the subject of the production of documents, are founded in the main on principles of common sense, and have been introduced into the practice of later times, and other systems of Jurisprudence; a brief summary of these regulations will be sufficient for my purpose. I stated in a former chapter, that, as an invariable rule, the Plaintiff was bound Edere actionem, that is, to declare to the defendant what species of action he intended to apply for to the Prætor, in order that the

Production of documents.

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other party might not be taken by surprise in his pleadings. In addition however to the Editio actionis, an Editio instrumentorum was also enjoined upon the plaintiff, who was compelled in consequence to state, for the information of the Judex, all the documentary evidence which he meant to rely upon, that the defendant might know how to shape his own case[1].

Editio instrumentorum.

D. 2. 13. 1. 3. D. 2. 13. 11.

The defendant stood in a better position, as regards the Editio, than the plaintiff, inasmuch as he was not bound to produce any instruments against himself, on the principle, that "Actore non probante, reum, etsi nihil ipse præstet, obtinere." This privilege was specially observed in criminal proceedings, for there the doctrine of the Roman Law was, that the prosecutor, on grounds as well legal as equitable, ought not to prove his charge by documents not belonging to himself. Nor was the defendant obliged to exhibit any other instruments

Defendant's position as to this Editio.

C. 2. 1. 4.

C. 2. 1. 1.

[1] But here the plaintiff was not obliged to produce any other documents than those he intended to make use of, save his book of accounts (rationes), for an order of the Emperor Alexander had insisted on their production at all events.

C. 2. 1. 5.

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than those which bore upon the case, unless the Fiscus was plaintiff, when the defendant could not avail himself of these privileges[1]. All instruments were required to be exhibited whole, and therefore where only a portion of any document, as, for instance, a written agreement, was produced, no notice was taken of it: any omission of the day and year when the instrument was reduced to writing, was of no consequence; but an omission of the day when payment was to be made, was a fatal objection: a strict attention to all these points was exacted in the case of bills and receipts, for in these it was held, that the day and year formed a necessary part. There was, however, a class of persons, occupying a peculiar position in Rome, who were subjected to a particular set of regulations in the matter now under consideration; these were the Argentarii, or money-lenders, who were obliged to produce their books of account,

Omissions in instruments.

Rule as to Argentarii.

[1] It should be noticed that these privileges applied only to private, not to public documents; for the Judex had power to command their production at the request of either party.

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properly dated, not only when they were plaintiffs or defendants, but even when they were not parties to the suit.

Not to dwell at any further length on this portion of my work, there are one or two points which may be noticed, ere I proceed to the more important topic of oral evidence. To what has been above stated on the subject of the production of documents I shall only add, that no particular form was required for their production, and that, when once they were admitted by the Judex, no cross examination upon them was allowed with the view of damaging their credit. If documents were lost, the loss might be supplied, and evidence of their contents given by such means as the Judex approved of; whilst if the lost document was a receipt for money paid to the Treasury, a copy of the entry in the Treasury books was admitted to supply the loss. In the absence of original documents copies were allowed, save when the Fiscus was plaintiff. As a general rule, the depositions of witnesses

No form required for production of documents.

Loss, how remedied.

C. 4. 21. 1.

Copies.

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and the evidence afforded by written instruments were of equal value; but in questions of ancient reputation, more credit was given to written, than to oral evidence. Lastly, except in some few cases (such, *e.g.* as the class of literal contracts), writing was not an essential requisite; for if the Res gesta had not been reduced to writing, the proof of its completeness might be established, and the act would be considered valid, even without a note in writing.

D. 22. 3. 10.

Writing, how far necessary.

D. 22. 4. 5.

From the consideration of documentary evidence I proceed to that of oral. This part of my subject I shall distribute under three heads, and shall explain, first, who might be witnesses; secondly, how many witnesses were necessary in every cause; and thirdly, how the evidence of witnesses was taken.

Oral evidence.

As a general rule, all were deemed competent to give evidence who were not labouring under any incapacity, whether absolute or relative; and in the list of those incompetent on the ground of absolute incapacity, were placed, first, Infants, Proximi

Competency of witnesses.

D. 22. 5. 20.

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infantiæ, and in criminal cases all under twenty years of age; secondly, Madmen; thirdly, Slaves, whose evidence was received, only after they had been submitted to torture; and lastly, Personæ infames, those whose infamy arose from a judicial decision, or in consequence of their callings[1].

C. 9. 41. 1. D. 22. 57.

D. 22. 5. 3. 5. D. 22. 5. 13. D. 22. 5. 21.

Competency.

The objection to such witnesses as came under the second head, that of relative incapacity, was founded on equitable grounds. Hence we find among those whose testimony was excluded on this account, every person who had any direct interest in the cause, whether parties to the suit, or not[2]; all accomplices in any offence; fathers and sons attempting to give evidence one for the other; every one subject to the orders of the summoning party, or attached to the household of a prosecutor in a Judicium publicum; and lastly, on the ground of

[1] The evidence of women was admitted, save of such as had been disabled by the Lex Julia de Adulteriis on the ground of adultery. Prodigi or notorious spendthrifts were classed as Furiosi or madmen.

[2] For "nullus idoneus testis in re suâ intelligitur."

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Inimicitia capitalis, all who were known to be about to commence criminal proceedings against the opposite party. But in addition to thus distinguishing the cases, in which the evidence of certain individuals was to be rejected, the Roman Law was equally particular in imposing directions on the Judex, as to the mode of taking the evidence, as to the manner of judging the credibility of the witnesses, and as to the degree of importance to be attached to the quality, rather than to the quantity of oral proof. Briefly to dismiss this last direction, it is enough to state, that, as a general rule, two witnesses sufficed in each cause (for one alone would not do[1]). At the same time, the Judex was expressly enjoined not to be influenced so much by the number, as by the "dignitas et auctoritas testium;" and while more weight was naturally attached to the testimony of eye-witnesses, yet

Nov. 90. 7.

Directions to Judex as to taking evidence.

Quantity of evidence. C. 4. 20. 9.

D. 22. 5. 3. 2.

[1] In this point a change had taken place since the days of the classical jurisconsults, at which time the rule "testis unus testis nullus" did not prevail. Of course in all those transactions where a certain number of witnesses was required by law, as in Wills, Codicils, Divorce, &c., the full number had to be produced.

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hearsay evidence was not altogether to be rejected, provided the parties, who gave such hearsay evidence[1], stated it from their own knowledge, and not from the mere relation of third persons. While full power was thus entrusted to the Judex to decide upon the merits of the case by the quality of the evidence brought to bear upon it, no less discretion was given him to judge of the credit due to each witness; "verumtamen," says Papinian, "quod legibus omissum est, non omittetur religione judicantium," for it is their duty to test the integrity of the witnesses, and to be influenced by the statement of men of worth and character. Nor was he left entirely to himself, unassisted by any directions of the law. He was directed to look to the following points: first, the condition of the witnesses' life; secondly, their general character and reputation; thirdly, their social

D. 22. 3. 28. Directions to Judex.

Pothier, Pand. xxii. v. § 15.

Ib. xxii. v. § 16.

[1] But it should be noticed that such admission of hearsay evidence is spoken of with reference to rights of service or easements referred to an arbiter, and does not seem to be a generally received notion.

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position; and fourthly, their demeanour in the cause: and as he alone had the power of summoning them, the parties would not only have to inform him how many and what witnesses they intended to call, but would have to abide his decision, formed after a previous examination of the witnesses, whether they were to be allowed to appear or not[1]. Having settled these preliminaries then, the parties were prepared with their oral proofs; and of the mode of taking the evidence I shall now speak, first premising that in all cases, whether civil or criminal, the witnesses were entitled not only to their full travelling expenses, but also to such further allowances as the Judex should deem necessary to support them while waiting for the hearing of the cause.

Travelling expenses.

C. 4. 20. 11. C. 7. 62. 6. 2.

In every case the Judex was bound to examine the witnesses himself, and not to rest contented with the production of

Oral proofs taken by Judex.

[1] It should be noticed here that the Roman lawyers did not recognise the introduction of experts and skilled witnesses as a formal part of legal evidence, though the Judex could, if he pleased, summon them to aid him in any question of difficulty.

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depositions, or affidavits,—"testibus, non testimoniis crediturum," says Hadrian; nor does it appear that the terms of this direction were relaxed, even where witnesses had in the interim died, on the express ground of the danger arising from fraudulent malpractices: though by later regulations, in case of unavoidable and necessary absence, the Judex had the power of issuing a commission to the attornies of the parties, for the purpose of taking on oath the evidence of such absentees[1].

D. 22. 5. 3. 3.

Examination how conducted:

We have arrived then at the stage when the witnesses were ready to be examined; and here the important question arises, how was that examination conducted? was it a secret one, and were the parties allowed to be present? It is a notion prevalent among many persons, that the Roman

C. 4. 20. 19.

[1] The term of fifteen days was allowed by the law for keeping the witnesses waiting. When that had expired they were permitted to return home, without fear of any process to compel further appearance. If the delay in hearing the cause was imputable to the Judex, the extra expense caused by the detention of the witnesses was thrown upon him as a punishment.

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system of jurisprudence was not only favourable to, but actually enjoined secret examinations; and some commentators have gone so far as to assert, that the parties themselves to the cause were excluded at such time. The general tenor however of the Roman Law, as exhibited in the Digest and Code, especially in those parts that treat of the examination of witnesses, is adverse to that view; and the ancient forms of proceeding shew so undoubtedly the existence of public examinations, as an established custom, that a change of this sort would have been one of a very revolutionary kind. The error may be traced to the use of the term *secreto* in the Code, where directions are given to conduct the examinations In secreto. This Secretum, or Secretarium, was simply the chamber where, in the Imperial days, the Judices sat to hear Causes; and as in olden times the Courts were open and uncovered, the word was coined to distinguish the locality, as covered in and separated from the outer regions. So far, however, from there being

not a secret one.

'In secreto' explained.

C. 4. 20. 14.

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any attempt at private examinations, it will be seen, from the instructions given to the Judices, not only that both parties were present, but that they could, either by themselves, or their advocates, cross-examine the witnesses opposed to them[1].

Examination 'in secreto' how conducted.

When therefore the parties to the suit and the witnesses were in the Secretum, it was necessary for him who produced the witnesses (or his advocate), to exhibit articles, explaining how he purposed to shape the examination, and then, before the

C. 4. 20. 9. examination commenced, his witnesses were sworn. When that was done, and the examination in chief had been gone through, the defendant was called upon to hand in a paper of counter-propositions, in order that the Judex might see the precise points

D. 3. 2. 21. to be proved. Then followed the Reprobatio, or objections made to the witnesses with the view of damaging their credit, by cross-examinations, counter-statements, or

[1] See Brissonius under the word Secretum, Huberi Prælectiones, iii. 1150; Gerard Noodt, Vol. II. p. 481; and Heineccii Antiquitates (Muhlenbrüch's edit.), 740.

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contradicting evidence. It would appear from a passage in the Novels, that the plaintiff and defendant were not restricted to a single summons of witnesses. Each if he pleased had three opportunities for producing them within short intervals, and when all these Productiones testium were completed, the Judex had to form his judgment from the whole of the evidence laid before him; when, to use the words of Arcadius, "Credendum est, quod naturæ negotii convenit, confirmabitque judex motum animi sui ex argumentis et testimoniis, quæ rei aptiora et vero proximiora esse comperit."

N. 90, c. 4.

D. 22. 5. 21. 3.

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CHAPTER VIII.

The Power of Appeal.

I NOW proceed to consider the subject reserved for this last Chapter, viz. the Power of Appeal, its origin and development.

Appeal in the early period of Roman History.

In the early days of Rome we shall find very slight traces of such a principle in the jurisprudence of the country; for though in later times its value, as a means of sifting the merits of a judicial decision, was fully recognised by the Roman lawyers, yet it was not till the complete settlement of the imperial authority that the power of Appeal from the decision of an inferior to a superior magistrate in civil suits was called into existence, or formed part of the regulations relating to proceedings by Action at Law.

Provocatio and Interventio.

For a long while the notion of Appeal was confined to a Provocatio from the

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unjust sentence of a consul, either to his colleague, whose sole remedy was an Interventio, or to the people at large, and this only in case of Publica Judicia; that is, of weighty crimes and offences.

Abundant examples of these Provocationes may be seen in the pages of the classical writers. Thus Livy, in recounting the story of Fabius, condemned by the dictator Papirius for an act of military insubordination, tells how his father appealed to the tribunes and to the people, in the words "Tribunos plebis appello, et provoco ad populum;" and in the case of Appius, distrusting the Judicium populi, he refers to appeal to the tribunes, as a last and certain safeguard.

Examples of the Provocatio: VIII. c. 33. III. 56.

So, too, in the pages of Cicero, Cæsar, Valerius Maximus, and Aulus Gellius, we have proof clear and sufficient that in every stage of judicial proceedings before the Prætor, from the Formula to the Executio, the intervention of the other Prætor, of the Consuls, or the Tribunes, could be demanded as of right. Still at the

Pro Tullio, 38. Pro Quintio, 7. 20, 21. In Verr. II. 1, 46. Cæsar de Bello Civili, III. 20. Val. Max. VII. 7, § 6. Gell. VII. 19.

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period spoken of by these writers (that is, the Republican era), the effect of such intervention was not to produce a rehearing of the matter, but simply to put *a stop, at once and for ever,* to the judgment so appealed against.

In the Imperial times.

The accession of Augustus to power had introduced an important change in most of the old Roman institutions. He was soon invested with an authority far more absolute than any that had hitherto fallen to the lot of a Roman; and among other things had acquired the dignity of Consul, in addition to that of Censor and Tribune One consequence of the possession of this latter office was, that he obtained not only the full right of interfering with every act of all the Magistrates in the State, but also the Provocatio from all judicial decisions. Hence in process of time the increasing influence of the throne, and the erection of other magistracies gave a new form to this Provocatio or intervention, so as to adapt it more thoroughly to the principles of the imperial Constitution; and out of the simple

The Provocatio changed,

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notion of the Provocatio and Interventio grew the more complex institution of the Appeal, properly so called. The principal features of this new institution I shall now briefly notice. At Rome itself the appeal lay from the Prætor to the Præfectus Urbi; in Italy, from the municipal magistrates to the Prætor, or the Præses; in the Provinces, to the Legati and the governors, and from them to the Proconsul. In very many instances appeals were permitted to be made to the Senate and to the Emperor[1], whilst the decision of a Judex datus was sent for revision to the magistrate by whom he had been appointed. In the reign of Constantine various important modifications were introduced into this branch of the Roman law of procedure.

and made a new institution.

D. 4. 4. 38.

D. 39. 2. 1. D. 39. 2. 4. 3 & 4.

D. 49. 3. 3.

In proceeding with an appeal all that was necessary was for the dissatisfied party, in court, and immediately after the judgment (apud acta), to call out, Appello; or, if he allowed a day or two to elapse, to prefer a

Mode of appealing.

D. 49. 1. 2.

[1] See an important case cited D. 12. 1. 40.

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written notice (libellus[1]) of his intention to appeal, whereupon the Judex was bound to furnish the appellant with a statement, in writing, termed Literæ dimissoriæ, to the effect that he had duly received and lodged his appeal, and then a copy of the record was added to it. These documents were, after a delay, fixed within certain prescribed limits, to be forwarded to the higher tribunal. If the appeal was addressed to the Emperor, a somewhat more formal process was required; for the judge himself, whose sentence was appealed from, had to prepare a detailed statement, in writing (relatio or consultatio[2]), of the matter, and this was sent to the parties for their approval, then transmitted by messengers to the office of the imperial cancellarii, and thence forwarded to the Auditorium (imperial privy council), there to be heard and settled. Such was the process in use up to the time of Theo-

Cod.Th. 11. 30. 63. 11. 31. 3.

C. 1. 14. 2.

Change in the reign of Theodosius II.

[1] In this libellus it was necessary to state the names of the appellant and the opposite party, and the purport of the judgment appealed against.

[2] See several of these Relationes given at full length in Symmachus, Ep. x. 48. 52. 53.

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dosius II.; in his reign another change was made, by which appeals were directed to be heard before a permanent commission, composed of the Prefect, Prætor, and Quæstor, so as to avoid the troublesome forms above specified; "ne nostris occupationibus," to use the emperor's words, "aliena defraudari commoda videantur." From that time the form of drawing up a Consultatio was done away with, save in the case of judgments delivered by the highest functionaries in the empire. With respect to the number of appeals permitted by the law in the same matter, that would appear to depend on the position and degree of the judge, whose judgment was objected to. In Justinian's time no person could make more than two appeals; but where the matter had been referred to the emperor at once, or had been argued before a Præfectus Prætorio, no farther hearing was allowed. Where appeals were dismissed as being groundless, or as founded on error, a fine was imposed on the appellant, who was always obliged to deposit a sum as security for his costs or

C. 7. 62. 32.

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fine—an opportunity of levying heavy tolls on unfortunate suitors, which was not thrown away in the days of imperial corruption and Roman decay[1].

[1] An indirect mode of appeal from the decision of the Præfectus Prætorio was permitted about 200 years before Justinian's reign, by means of what were called Supplicationes, or Retractationes; and a mode of paralysing judgments was also in use by considering them null and void, on the score of informality, a process somewhat in analogy with the ancient Revocatio in duplum.

C. 1. 19. 5.
C. 7. 62. 35.
D. 29. 8. 1. 2. & 3.
Pauli Sententiæ, V. 5 a.

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